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UNLEASHING "HIGH-TECH" WEAPONRY IN THE DRUG WAR:  
POSSE COMITATUS, THE FOURTH AMENDMENT AND ENHANCED SENSING

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, United States Army, or any other governmental agency.

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40TH JUDGE ADVOCATE OFFICER GRADUATE COURSE

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ABSTRACT: Congress created a sketchy exception to the Posse Comitatus Act's prohibition on military law enforcement for drug interdiction. The resulting legislative patchwork broadly authorizes use of military equipment and personnel for law enforcement, but unnecessarily restricts the most beneficial uses of sophisticated remote sensing hardware by forbidding direct participation in a search. The war on drugs will not succeed unless Congress, the Department of Defense, and the courts replace the statute, its regulations and the Fourth Amendment law it incorporates.

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The shadowy figures of 1st Platoon, Kilo Company, crept into the second hour of the night patrol. Peering hard into the new moon's shadows, just south of Las Cruces, New Mexico, First Lieutenant Bright tried to visualize the terrain. "Should be just over the next ridge," he whispered to himself. "There." The point man froze, shouldered his M-16, and touched his hand to his ear to let his platoon commander know voices were coming from within the isolated, apparently abandoned, adobe 200 meters ahead. Through his startron night scope Bright could see three men opening and inspecting the contents of several barrels just inside the door. At his signal, the Drug Enforcement Agents with the unit sprinted up and stopped the men -- just after a handshake and the passing of a briefcase between two of the figures, but before they made it to their Range Rovers. "Damn those satellite boys are good," Lieutenant Bright thought to himself with a skyward glance, "they got us the drop point right on the money. They even ID'ed the bad guys' rides."

## I. Introduction

It is not Tom Clancy<sup>1</sup>. It is United States Congress.<sup>2</sup> Political, popular, and practical pressure is pushing the military into a greater role in fighting drug abuse. These counter-drug operations raise serious questions about the clarity of statutory and regulatory guidance at the point where drug control initiatives meet the Posse Comitatus Act. Even more tangled is the constitutional framework applicable when forces use military sensing technology. Turning the focus of military enhanced detection capabilities from foreign foes to criminal catching makes conventional Fourth Amendment "expectation of privacy" notions obsolete.

After a short exegesis on the drug threat driving the demand for military action, this article will recount the evolving legislative actions in the area of support to civilian law enforcement. A quick study of the regulatory directives and administrative decisions provides the basis for the crux of the discussion: is the use of military enhanced sensing an improper "search," either under the Posse Comitatus Act or the Fourth Amendment? I conclude that it is not and

question the continued utility of a criminal prohibition and vague notions of constitutional and historical ground for keeping the military out of civil law enforcement. I conclude with a call for clarification of the statutes, regulations and court decisions. Only practical, affirmative statements of authorized activity will remove the hesitancy of military leaders, and their attorneys, to put "the full might of America . . . into this [drug interdiction] operation."<sup>3</sup>

A. The War on Drugs.

President Nixon may have first coined the phrase, "war on drugs," in 1971<sup>4</sup>. The drug war was more forcefully declared by President Reagan in 1982<sup>5</sup>. President Bush continues to prosecute the campaign into the 1990's in an increasingly war-like fashion.<sup>6</sup> The battle against drug abuse pre-dates, however, both the metaphorical and the literal militarization of the effort.

1. The Use and Abuse of Drugs.-- Humankind has used natural and processed substances to dull or hone the senses since antiquity.<sup>7</sup> America's own history of



drug abuse is not short. The debate over what effort to put into its control is almost as long.<sup>8</sup>

Drug abuse is a staggering problem. After years of prohibition and a decade of war, cocaine, heroin, marijuana, and other drugs are still easily obtainable.<sup>9</sup> Abusers spent over forty billion dollars on the purchase of illegal drugs in 1990.<sup>10</sup> The roughly 240 billion dollar estimated economic cost of drug abuse in lost productivity, property crime and diverted resources dwarfs that figure.<sup>11</sup> Narcotics use contributes to violence, homicides, delinquency, automobile accidents, and even AIDS' spread, not accounted for in the "dollars lost" calculations.<sup>12</sup> But what to do about it?

The attack on the drug problem is three-pronged. The "demand-side" approach uses education, treatment and deterrence to reduce consumption from the user perspective. Although more people are "just saying no," the demand for drugs has increased because of greater use among the remaining harder-to-reach hard-core users.<sup>13</sup> The pure "supply-side" approach seeks to eradicate the drugs at their foreign source. For cocaine that is the Andean region, for heroin, Asia and

Central America, and for marijuana, Mexico and the Far East. Increased international efforts have not slowed production. Recent figures show record levels of both coca leaf and opium, the cocaine and heroin raw materials.<sup>14</sup> Finally, interdiction efforts try to prevent drugs from entering the our country. This includes off-shore interceptions, border controls, and seizures at storage or trans-shipment points within the United States.<sup>15</sup> Drug captures have increased each of the past five years with little effect on the supply available to abusers.<sup>16</sup>

2. Drug Control Policy.-- Administration policy is to attack along each of the three fronts. Federal agencies provides grants to state and local levels to reduce demand through treatment and education programs.<sup>17</sup> To achieve success in the long term, we must diminish the clamor for illegal drugs. It is a gargantuan task given the highly addictive forms of drugs entering the market.<sup>18</sup> Coupled with the social side-effects of abuse ranging from absenteeism to street-crime, the demand for drugs is a societal ill which will be with us well into the next century.<sup>19</sup>

Equally difficult is the destruction of foreign sources of supply. Economic reality is the prime obstacle. Drug revenues are such a large portion of producer countries' economies that no change is possible without effective aid programs to replace drug-related employment.<sup>20</sup> In the cocaine-dominated Andean region, drugs undermine even political authority, complicating immensely any attempts to conduct regular eradication programs.<sup>21</sup> Despite Andean Initiatives and drug summits, no quick plugging of the producer end of the drug pipeline is likely.

Interrupting processing and delivery of the drugs in or near the United States is the remaining approach. It has its flaws<sup>22</sup>, but may also count some successes.<sup>23</sup> The primary criticism of interdiction is that it cannot stop all smuggling and that it is not the sole solution. Both are valid complaints. It is, however, the only mechanism for limiting drug use in the short-term (by reducing availability and increasing price).<sup>24</sup> It is also the most logical area in which to enlist military support.<sup>25</sup>

B. Military Involvement.

The military has had some level of involvement with solving drug problems since the 1960's. State and local authorities sounded their real cry for support in the last decade. Governors, mayors, sheriffs, and anyone else casting about for additional resources in their fight against drug abuse urged Congress to get the armed services more involved.

1. National Security.-- The rhetoric most cited to justify tapping military aid was the drug problem's threat to the nation's security. More than an impassioned rallying cry, the proposition has some merit. The powerful government-challenging force the drug barons of South America have become certainly influences Hemispheric diplomatic relations. The potential link between at least portions of the production and transportation operations and militant insurgencies provides another political twist.

In the long term, the toll American society pays for drug abuse justifies a true defense from the Department of Defense. The lost human potential in "crack babies" and "dealer wars" make drugs the most insidious external threat the nation has ever faced.<sup>26</sup> Secretary Cheney recognized this when he declared, "the

detection and countering of the production, trafficking, and use of illegal drugs is a high-priority national security mission of the Department of Defense."<sup>27</sup>

2. Counter-drug Operations.-- Just what does combatting illegal drugs in the name of national security entail? As it has evolved over the past several years, the Department of Defense's involvement in the drug war encompasses three basic missions: detection and monitoring, support to civilian law enforcement agencies and international operations.<sup>28</sup> Detection and monitoring are currently the only direct roles. Congress made the Department of Defense lead agency in detection of air and sea transit of illegal drugs into the United States.<sup>29</sup> This includes the use of ground radars along the border and in foreign countries to identify potential interdiction targets. The involved forces also employ air and sea based sensors. Military personnel may intercept a vessel or aircraft detected outside the United States to identify and communicate with it. This authorization includes tracking and pursuit but not blocking or force down of any craft. The apprehension step of interdiction

usually requires interoperability and communication with civilian law enforcement.<sup>30</sup> For naval vessels carrying Coast Guard teams, however, a one-ship stop is possible.<sup>31</sup>

Current operations in support of civilian law enforcement range from equipment loans to border patrols.<sup>32</sup> In answer to requests from civilian authorities, Joint Task Force 6, for example, has provided Army Special Forces and Marine Corps reconnaissance teams for observation of smuggling routes. These forces have deployed remote motion sensors and ground surveillance radar to give law enforcement officials the ability to cover large swaths of their responsible area despite limited manpower.<sup>33</sup> The sophisticated military expertise transferred to civilian drug warriors includes intelligence analysis, photo-reconnaissance, and information management. Most immediately felt in the supporting mission are less glamorous forms of aid like transportation of civilian agents, road clearing and container inspection.<sup>34</sup>

The international operations focus primarily on the Andean region. They are undertaken within the traditional framework of State Department assistance

programs to foreign governments. Host nation support can include training in tactics and use of repairs, equipment, and transfer of qualifying defense materiel.<sup>35</sup> Military planning and targeting expertise directly contribute to the efforts of foreign and U.S. drug enforcement personnel working on coordinated operations. U.S. forces presently have no officially recognized combat role.<sup>36</sup> Naval tracking and interdiction actions in international waters through coordinated efforts like Operation Bahamas, the Turks and Caicos Islands, have also been successful to the point of diverting traditional smuggling routes.<sup>37</sup> Bilateral diplomatic efforts to increase coordination along with United Nations sponsorship of multinational attacks on the drug trade show promise.<sup>38</sup>

The military certainly has a part to play in countering illegal drugs. If there is a solution to the problem the ingenuity and resolve of the armed forces can help find and execute it. As British military scholar General Sir John Hackett summed up the military's role: "The function of the profession of arms is the ordered application of force in the

resolution of a social problem."<sup>39</sup> Drug abuse is no exception.

C. The Three-part Knot.

The armed services are aiding the anti-drug effort in ways most of us could not have been imagined ten years ago. But a worrisome specter still haunts the Department of Defense's support of civilian law enforcement. Despite the headlong rush to bring military might to bear in the drug war, posse comitatus is not dead.

Three interrelated restrictions circumscribe the legal use of armed forces personnel and equipment: the Posse Comitatus Act's limits on direct support, the Department of Defense's regulations and opinions conservatively applying the Act, and the courts' hints at sanctions or worse if military involvement in law enforcement grows too great.

The rulings from the three boundary-defining bodies are like interwoven threads. The courts looked to Congress to determine the scope of their legislation. Congress cited court opinions in attempting to refine their statutory guidance. To issue regulations and approve operations, the



Department of Defense has had to divine the limits of legal activity from conflicting court rulings and mixed-signal legislation.

I will examine each actor in turn. First, however, it may be helpful to flesh out in more detail the basis of the problem. The Congress cast about in its frustration with drug control efforts. Defense Department aid was to be the salvation. Military commanders routinely denied informal requests for help from civilian authorities. They recited the Posse Comitatus Act's prohibition on military enforcement of civilian law.

Congressmen wanted to send a message to the military that help in certain areas of crime fighting was proper. Some noted that this amendment was a break with over a hundred years of tradition. Others thought it did not go far enough in making the war on drugs a full-fledged one. A few noticed that the compromise language passed ostensibly to clarify the Posse Comitatus Act's bounds was no paragon of lucidity. The armed services were to train, advise, equip, transport, and share intelligence with civilian police. They had to detect, monitor, and intercept drug traffickers.

However, the services were told, if you directly participate in a search, seizure, arrest, or similar activity you could go to jail.

The Congress cannot bear all the blame. The courts had wrestled with the intended limitations of the posse comitatus statute on scattered occasions. Their results also varied. In an interesting case of legislative history making, Congress cited several of the decisions. They arose out of the actions to suppress the American Indian Movement uprising at Wounded Knee. The rulings on whether Army assistance was violative of posse comitatus restrictions, were split. They tried to put some meaning into the statute by fashioning a direct versus indirect support test. Unfortunately, much of what the courts held improper at Wounded Knee seems less direct than the indirect activities mandated by Congress in the effort to aid civilian law enforcement. The use of the opinions to support the amendments merely adds to the confusion.

Against this backdrop of mixed signals, the Department of Defense has attempted to carry out its responsibility to issue regulations preventing the prohibited direct involvements. They carry forward

much of the hard to apply direct/indirect distinctions as well as uncertain guidance as to where the required detection and monitoring ends and the criminal direct participation in a search begins. Complicating matters further is the overlay of constitutional search law upon the statutory definition of prohibited actions.

The Department of Defense has taken the conservative view that use of much of the military's sensing assets in the drug war is improper. While understandable considering the potential criminal penalty for overstepping the tortuous boundary, it certainly keeps the military's best anti-drug guns in the holster.

## II. Limits on Support to Civilian Law Enforcement

The history of military involvement in civil affairs for the American heritage pre-dates our founding. The mix of political resentment and practical reason for restricting use of soldiers in police matters has become associated with the notion of posse comitatus.

### A. The Posse Comitatus Act.

The code provision is actually a criminal proscription which literally provides:

Whoever, except in cases and under circumstances expressly authorized by the Constitution<sup>40</sup> or Act of Congress,<sup>41</sup> willfully uses any part of the Army or the Air Force as a Posse Comitatus or otherwise to execute the laws shall be fined not more than \$10,000 or imprisoned not more than two years or both.<sup>42</sup>

No one has been charged or prosecuted under the Posse Comitatus Act since its enactment.<sup>43</sup> It remains, however, a statute greater than its terms. It has evolved into an embodiment of all concerns about military-civilian relations in the American political psyche.<sup>44</sup>

1. Early History.-- The common law tradition provides the name posse comitatus.<sup>45</sup> In medieval England a magistrate or sheriff could summon any male over the age of fifteen to aid him in keeping the peace or pursuing fugitives.<sup>46</sup> Colonists brought this authority, as well as, their hearty mistrust of its overuse, to America.<sup>47</sup> The reservations turned to rebellion. Distance from the Crown lessened civilian

control of the Army in the New World. British troops requisitioned private homes under the Quartering Acts. Because of the rising rage of the colonists, a few farsighted British commanders and ministers cautioned against using troops to aid civil authorities.<sup>48</sup> Their views were overtaken by events as the Boston Massacre lead to the Boston Tea Party, and eventually, Bunker Hill.<sup>49</sup>

The use of British troops to put down the early disorders of the fledgling revolution was telling. It weighed heavily in the drafting of the Declaration of Independence. The founding document contains provisions inveighing against troop abuses and abandonment of civil authority over the military.

This outpouring had moderated by the time the rebels won the war. Scholars differ over the extent to which the Constitution embodies separation of civilian and military. While there is evidence for a healthy concern about control over military actions and fear of a standing national army, no clear restraint on use of the military in civilian matters exists in the constitutional convention's end product.<sup>50</sup> For that the nation waited until after its next revolution.

Before delving into reconstruction politics and the roots of the Posse Comitatus Act, consider two important points about this early history. First, it is just that, history. The attitudes toward military organizations is not unexpected when a citizen militia has just defeated the enforcers of an empire. They have limited utility in fashioning contemporary roles for the armed forces. Second, reciters of Revolutionary War and constitutional convention credos seldom distinguish between cries for a military under civilian control, and one free from involvement in civilian affairs. While lack of the latter case may prompt greater attention to the former, the founding fathers feelings about independent standing armies provides no support for a constitutionally mandated limit on military law enforcement.<sup>51</sup> The posse comitatus restriction is a creature of statute and the troubled times in which the Congress enacted it.

The power to raise a posse comitatus in American law flowed from the powers granted federal marshals in 1789.<sup>52</sup> Soon the use of military personnel, along with other adult citizens, to help law enforcement officials became a fairly common practice.<sup>53</sup> Similarly, the

President never felt restrained from using the military to enforce civil order by any inferred constitutional bounds. As President, George Washington in 1794 commanded federalized troops in suppressing the Whisky Rebellion.<sup>54</sup> The action did not rend the young nation.<sup>55</sup> In fact, the Executive has invoked emergency power to send in federal troops over 100 times.<sup>56</sup> The Posse Comitatus Act did not seek to change that use of the military to enforce laws. It was aimed at specific perceived abuses in the post-Civil War period and is a child of North-South tension.

2. Civil War and Reconstruction Era.-- No events influenced the passage of the Posse Comitatus Act<sup>57</sup> as much as the use of federal troops to enforce unpopular Reconstruction laws and supervise the post-war presidential election of 1876.<sup>58</sup> Southern Democrats were outraged over the "stealing of the Presidency" by Republican Rutherford B. Hayes in his too close to call victory over Samuel J. Tilden. They blamed the loss on the use of troops during balloting and vote counting in several Southern states.<sup>59</sup> Perceived abuses in enforcement of laws like the Ku Klux Klan Act with armed soldiers provided the base of support for

restricting the Army's activities.<sup>60</sup> The debates show that it was less a philosophical concern with civil-military relations<sup>61</sup>, than discontent with specific uses of military that drove the passage of the Act. Even ad hominem attacks on the federal troops fueled the legislation's passage.<sup>62</sup> What the legislative history reveals<sup>63</sup> is that the evils the Act aimed to end may be gone from our modern military and contemporary society.<sup>64</sup> At best, the Act embodies the practical preference for handling of law enforcement by local authorities, where possible.<sup>65</sup> It is not a clear guide for delineating the proper line between military and civilian law enforcement activities. And it is certainly not a viable basis for criminal prosecutions.<sup>66</sup>

3. Attempts at Application, 1878-1981.-- Posse comitatus received little attention in the first 75 years after its passage. What may be most telling after the strong rhetoric about its dire need is the scarcity of complaints about the Act's violation during this period. North-South Reconstruction-related tension eased. Various officials continued to use the military in civilian affairs, usually without protest.



This included the use of the Army to enforce process in New Mexico by the "usurper," President Hayes, less than four months after Congress passed the Act. Federal troops supported local law enforcement in controlling strikes and other riotous disorders, capturing President McKinley's assassin in 1901, preventing looting after the 1906 San Francisco earthquake, guarding the mint in 1933, defusing countless bombs and chasing uncountable fugitives.<sup>67</sup>

The judge complimented the lawyer who dusted off the Posse Comitatus Act for finding such an "obscure and all-but-forgotten" provision.<sup>68</sup> The case involved prosecution of accused propagandists in post-World War II occupied Germany. Separate circuits heard two similar cases. The courts each had no difficulty finding that use of military authority to enforce the laws was necessary and that the Posse Comitatus Act was not a bar to jurisdiction.<sup>69</sup>

The next challenge was to the sufficiency of indictments. It was to prove more serious. Four cases arose out of the 1973 American Indian Movement uprising at Wounded Knee, South Dakota. Violation of the Posse Comitatus Act was held to affect the lawfulness of the

civilian officials actions.<sup>70</sup> This was an element of the charge involving interference with a law enforcement officer's duties.<sup>71</sup> The activities of two military observers on the scene and National Guard units who supplied the local and federal civilian authorities with equipment raised the issue. Each defendant alleged that the government could not meet its burden of proving the "lawful performance" of the obstructed acts. This was based on the provision of support from military sources in violation of the Posse Comitatus Act.<sup>72</sup>

The courts split. The Banks<sup>73</sup> and Jaramillo<sup>74</sup> judges found improper military assistance. The McArthur court found no objectionable involvement.<sup>75</sup> The Red Feather result was mixed, finding for the government, but only after allowing defendant to show wrongful direct active support.<sup>76</sup>

The rationale employed were also a mixed bag. Using a conclusory "totality of the circumstances" approach, the Banks court found that the civilians had used the military "as a posse comitatus or otherwise" to execute the law.<sup>77</sup> The court failed to specify the exact nature of the potential Posse Comitatus Act

violation,<sup>78</sup> but was disturbed by the military hardware provided.<sup>79</sup> The judge in Jaramillo also found that the law officer acted "unlawfully". This was based on the government's failure to prove beyond a reasonable doubt that no one violated the Posse Comitatus Act.<sup>80</sup> The opinion was more specific. The court focused on the use of personnel, not equipment, as triggering the violation. The provision of materiel does not violate the Act.<sup>81</sup> The presence of the uniformed advisors and support National Guard<sup>82</sup>, and the help they gave, so pervaded the activities that the government did not meet its burden.<sup>83</sup>

Red Feather presented the opportunity for yet another view. Agreeing in part with the Jaramillo court, the judge did not find a violation in the use of military equipment. The Act only bars a "direct active use" of troops, not passive indirect military involvement.<sup>84</sup> The chaos comes in the court's recitation of acts in its "active/passive" dichotomy.<sup>85</sup> It includes everything done at Wounded Knee as permissibly passive.<sup>86</sup> Then, without clear reference to the Act or other guidance, the opinion lists active prohibited actions. They include arrest, seizure of

evidence, search of a person or building, investigating crimes, chasing fugitives and "other like activities."<sup>87</sup> These may be reasonable or desirable. They are not, however, supported by history, case law, or statute.<sup>88</sup>

The last of the cases in time and tone is McArthur. Its court criticizes each of the other decisions.<sup>89</sup> Although it condones lending equipment to civilians, it rejects the standards applied in the other opinions.<sup>90</sup> Instead of the military pervading civil enforcement, as in Jaramillo,<sup>91</sup> or going to far on the "passive/active" continuum, as in Red Feather,<sup>92</sup> the court looked to see if military personnel subjected civilian citizens to regulatory, proscriptive, or compulsory military power.<sup>93</sup> The opinion revives the popular spirit of the Posse Comitatus Act as a protecting shield for individual rights from the inherent danger of military authority.<sup>94</sup> Simply said, the court had as much difficulty with the plain words of the Act as any other interpreter. That is appropriate for the finale to a set of decisions that commentators criticize for their confusion<sup>95</sup> and vagueness.<sup>96</sup>

In sum, the courts drew four differing standards from the language of the Posse Comitatus Act. Banks objects to mere presence of troops. Jaramillo would not let the troops pervade the actions of the civilians. Red Feather allows military involvement so long as it remains passive. McArthur would allow any actions short of military compulsion or restraint of civilians. The application was even more conflicting. Thus the advisers and mechanics were passive indirect support for Red Feather.<sup>97</sup> Jaramillo, however, would call them improperly pervasive.<sup>98</sup> The provision of equipment is clearly not a violation under the Jaramillo,<sup>99</sup> Red Feather,<sup>100</sup> and McArthur<sup>101</sup> tests. It is improper even to lend equipment under the Banks holding.<sup>102</sup>

The lack of ascertainable guidance, or even practical underpinning, in the original legislation helps explain the problem courts face in applying the Posse Comitatus Act. The Congress of 1878 was mad at the Army and the civilians who used it. No amount of judicial synthesis is going to rationalize the vague criminal prohibition which resulted.<sup>103</sup>

4. Practical Attacks on the Act.-- The problem with the Posse Comitatus Act is deeper than its varied application by courts. Although it is a criminal statute, as noted earlier, no one has ever been prosecuted under its provisions.<sup>104</sup> There have been ample opportunities.<sup>105</sup> As a practical matter, as long as the assisted enforcement has not upset anyone but perhaps the accused, no prosecutor will seek criminal sanction.<sup>106</sup> Several commentators have questioned to whom the Act applies.<sup>107</sup> Does a prosecutor charge the soldier, the sheriff, or the Secretary? The uncertainty has certainly limited the Act's invocation.

Uncertainty in application applies on a larger scale as well. The original Posse Comitatus Act, as a rider to the Army appropriations act,<sup>108</sup> applied only to the Army. During the creation of the independent Air Force, Congress amended the Act as part of the general application of pre-existing Army provisions to the new service.<sup>109</sup> The Navy and Marine Corps were never included in the prohibition. Historically, the Navy was not involved in the specific abuses the Congress sought to punish with the Act.<sup>110</sup> What rational

distinction exists between using Marines at Camp Lejuene instead of soldiers at Fort Bragg to aid the North Carolina authorities? None but the outmoded aims of the Act. Similarly, the statute ostensibly prohibits National Guard members from helping enforce laws when in a federal status. If the Secretary of Defense uses the same "part of the Army or Air Force" in a state status, however, they mysteriously avoid the evil of military involvement. The title of the Code under which a National Guard unit is activated determines whether the conduct is commendable or criminal.

The most incongruous application of the Act's line drawing is in the use of the Coast Guard. It is essentially a military organization. Unlike other branches, it has among its missions a specific mandate to enforce civilian laws at sea.<sup>111</sup> Why a dope toting suspect asked to halt at the end of a Coast Guard cutter's gun feels materially different from one a Navy frigate stops is unclear. The program placing Coast Guard teams on Navy ships amplifies the hair-splitting. The Coast Guard is involved in the law enforcement action, only after the Navy has detected, chased and

intercepted the vessel.<sup>112</sup> Is any notion of military-civilian separation<sup>113</sup> really served by the Posse Comitatus Act as applied? The particularly ambiguous application of the Act to actions outside of the United States deserves fuller analysis.

5. Extraterritorial Application.-- Any logic to limiting military support to United States civilian law enforcement becomes strained once the activity occurs outside U.S. territory. Extraterritoriality certainly overcomes concerns about inappropriate military involvement in domestic affairs. Soldiers are not improperly confronting citizens.

When the operational situs moves to the more traditionally military foreign security realm, the historic restraints of the Posse Comitatus Act do not apply.<sup>114</sup> Domestic use of the Army is the focus of the Act and its legislative history. The language, "or otherwise to execute the laws" means United States laws.<sup>115</sup>

This interpretation recognizes the Executive's authority in foreign affairs. The President may, and frequently does, permissibly act abroad through the military departments. It also avoids the Act's



ambiguous targeting. Congress cannot have meant to impose criminal sanctions upon foreign officials who request aid.<sup>116</sup>

The courts have upheld this logic. The first case to interpret the Posse Comitatus Act after its long dormant period ruled without hesitation that the Act was not applicable overseas.<sup>117</sup> More recently, in United States v. Yunis, the court approvingly quoted the prior holding.<sup>118</sup> Because no statutory language reveals a contrary intent, the opinion presumes the Posse Comitatus Act to have no extraterritorial application.<sup>119</sup> Most reviews of the Act by service Judge Advocate Generals and legal commentators have reached a similar conclusion.<sup>120</sup>

A practical notion underlies the conclusion that the Act applies only in the United States. Congress could not have meant to bar the Army from acting when no other authority available. If you really need military help to enforce the laws, the Posse Comitatus Act will not stand in the way.<sup>121</sup> This the right way to interpret the vague language and purpose of the Act. It is, however, no way to remove the hesitancy of the

armed forces to support law enforcement operations in the face of potential criminal penalties.

The patchwork application is troublesome. The Act allows apprehensions overseas while those inside the United States are not. Coast Guard members can make arrests. The sailors standing next to them cannot. Marines may not fall under the ambit of the statutory language. The Act covers soldiers at the adjacent installation. A National Guard unit activated on state status can perform counterdrug operations. The same uniformed personnel commit a crime if called up under federal status. Analysts favoring and opposing military involvement in enforcement of civilian laws have both been unhappy with these ambiguities in applying the Posse Comitatus Act. Those in Congress sought to do something about it in 1981.

B. Enter the Drug War.

The initial effort to clarify the Posse Comitatus Act restrictions came from a concerned group in Congress. They were upset with the chilling effect the criminal statute had on military support for law enforcement efforts. This was no truer than in the

realm where local officials were feeling the most overwhelmed: drug interdiction.

The willingness of the Department of Defense to raise the shield of potential posse comitatus violations whenever police requested aid sparked congressional consternation.<sup>122</sup> This dismay merged with the rising national concern over drug smuggling. Several proposals to encourage Department of Defense support to civilians resulted.<sup>123</sup>

The legislative provisions which Congress finally approved it styled amendments to the Posse Comitatus Act.<sup>124</sup> They are more accurately considered affirmative statements of authorized support. The compromise provision did not replace the 1878 language. It merely "clarifies that Act" and "existing practices of cooperation between the military and civilian law enforcement authorities."<sup>125</sup> This meant that Congress removed some of the ambiguity, but little of the impracticality, from the original Act. Rather than starting from a clean slate, Congress approved several support activities, couching them in terms of existing practice.

1. Exceptions to the Posse Comitatus Act.-- The statute affirmatively countenances provision of military intelligence information,<sup>126</sup> equipment and facilities,<sup>127</sup> advice and training,<sup>128</sup> and equipment operation and maintenance support.<sup>129</sup> Although courts and counsel had been struggling with the operative meaning of the original statute for years, the Congressional guidance suggested that only the equipment operation and maintenance role might be "a modest and conditional departure from the current strictures of the Posse Comitatus Act."<sup>130</sup> The remaining provisions were considered simply codification of existing practice.

The House Report supported this assertion by referring to the Wounded Knee cases.<sup>131</sup> As previously discussed, the conflicting rationale, examples and results from those cases provides no firm footing for practical application.<sup>132</sup> The reliance on their citation with a summary discussion as a basis for the statutory clarification is unfortunate. It carries over the inconsistency and ambiguity of those rulings.

Provision or loan of equipment is one example. The Secretary of Defense is specifically authorized to make military equipment or facilities available to civilians under the amendments.<sup>133</sup> The extensive of materiel and equipment provided to law enforcement at Wounded Knee was at the heart of the Banks court's finding of improper activity.<sup>134</sup> The court criticized receipt of advice from the military observers on the scene in both Banks<sup>135</sup> and Jaramillo.<sup>136</sup> It is just such an advisor role which the training and advising provision appears to contemplate.<sup>137</sup>

The "aerial reconnaissance" included as part of the support equipment operations is no different than the overflight information found improper by the Jaramillo court.<sup>138</sup> On the other hand, the Red Feather opinion approved "aerial photographic reconnaissance."<sup>139</sup> Congress' selective picking of "current strictures" from among the confused case law does little to aid operational decision makers. They may still rightfully wonder whether they are following congressional mandates or committing felonies when they order support to law enforcement officials.

Interpreting the language of the 1981 statute as endorsing primarily the analysis in the Red Feather case is helpful but not conclusive.<sup>140</sup> Room for interpretation remains abundant in the listed areas of support to civilian police. And while the criminal sanctions of the original Posse Comitatus Act has continued vitality, such uncertainty is momentous.

The sharing of information with local authorities appears on its face to be fairly straight forward.<sup>141</sup> It most clearly falls within approved preexisting practice. Yet, even reporting crimes has its nuances under the Posse Comitatus Act. Soldiers must gain information in the "normal course" of training or operations to avoid a violation. Is an undercover criminal investigation of a military member's wife in the "normal course?" At least one commentator thinks that it clearly is.<sup>142</sup> The propriety may not be so distinct if military police begin the investigation at the behest of civilian law enforcement.<sup>143</sup>

Congress provided for training of policemen in the statute. Use of a military classroom for scheduled civil disturbance instruction should not raise any Posse Comitatus Act problem.<sup>144</sup> If the military

provides the same training as police units are preparing to respond to an ongoing riot, they may have violated the Act.<sup>145</sup>

The plain language of the statute contains these subtle shades of meaning . They pale when compared to the interpretive twists required to reconcile the prohibitive section<sup>146</sup> with actions in the title's affirmative requirements.

2. Maintaining Prohibitions Despite the Exceptions.-- In response to criticisms that the authorized military support for civilian law enforcement had gone too far, Congress added a qualifier, tempering the amendments.<sup>147</sup> The provision is drawn directly from the unfortunate language in Red Feather on prohibited activities.<sup>148</sup> The problem created is two-fold.

First, the reliance perpetuates the amorphous direct/indirect distinction.<sup>149</sup> While it may be more helpful than the original Act's "or otherwise execute the laws," condemning active direct aid while condoning passive indirect support provides little practical guidance. Commanders may still be unclear about the propriety of detailing troops or equipment in response

to requests. They could be directly aiding civilians when military police interview all the on-post witnesses to a crime for local police. Is provision of a military working dog for tracking a fugitive direct or indirect involvement in the apprehension? The distinction is just not discernable enough to govern day-to-day operations.<sup>150</sup>

Second, the plain language of the restriction and other portions of the statute are at odds. Section 371 tells commanders to provide intelligence information without delay. They may even consider law enforcement needs in executing operations. In response, the commander runs patrols in remote areas where marijuana is illicitly grown. The units use military radios to inform federal agents of the growers they find. They even provide a lift to the area, then guide the agents to the exact location. Is that more than indirect assistance? Courts criticized less involvement at Wounded Knee.<sup>151</sup> On the other hand, other sections of the 1981 statute authorize each part of the operation.<sup>152</sup>

With the possible exception of providing facilities for training, each area of cooperation



encompassed in the amendments can conceivably run up against a direct participation bar. When does contemporaneous expert advice become direct participation in an arrest?<sup>153</sup> Is supplying maps, operation plans and manuals sufficiently indirect? Is the answer the same if sailors prepare them at the request of the Drug Enforcement Agency for a specific raid to seize contraband?<sup>154</sup> What is the legality of providing the jeep ride to an apprehension?<sup>155</sup>

In real world situations the theoretical direct participation standard is almost useless. Legislators must remember that "soldiers are sometimes faced with legal difficulties to be solved in a flash which could take a trained lawyer hours to consider."<sup>156</sup> Use of general guidance might be enough if Congress were merely directing desired use of military assets. When drawing the line for potentially criminal actions though, the brush is too broad.

The cause for this troublesome ambiguity is that the 1981 statute may be too representative of Congressional intent. It mirrors the split of concerns between those who wished to unleash the considerable expertise of the military against drug trafficking, and

those who feared military action in civilian realms.<sup>157</sup> By appeasing stalwarts on both sides of the argument, Congress failed in its attempt to clarify the Posse Comitatus Act.<sup>158</sup> Some policy makers recognized this inadequacy.<sup>159</sup> The resulting tries to refine the 1981 language changed the provision several times.<sup>160</sup> Concern with the military's activity on the drug front continues to generate legislation with virtually every Authorization Act.<sup>161</sup>

3. A Decade of Tinkering.-- Changes to the cooperation with law enforcement provisions generally allowed greater support by the military. Concern about drug problems heightened while the assistance already authorized caused no rents in the fabric of society.<sup>162</sup> Congress was more worried by the perception that the Department of Defense was dragging its feet.<sup>163</sup> The legislators expanded each area of support and gave several new responsibilities to the military.

Instances where military units could transfer information received as a result of operations to civilians increased. Rather than just passing on intelligence gathered incidental to normal activities, the change required armed forces to consider civilian

law enforcement needs when planning operations. Relevant information must be provided promptly.<sup>164</sup> The most recent changes pushed the matter even further. A 1990 modification directed the Secretary of Defense to identify drug interdiction areas, then conduct operations there "to the maximum extent possible."<sup>165</sup>

Two clarifications similarly expanded the equipment and training sections. Spare parts and supplies are now within the purview of § 372. Under the amended § 373, the Secretary must make available training for any equipment provided or advice on any law enforcement matter.<sup>166</sup>

Congress expanded military operation of equipment in 1988. It goes beyond the initial modest and narrowly construed allowance for personnel to operate equipment loaned under § 372.<sup>167</sup> Soldiers may operate any equipment, not just the military items, in support of any law enforcement purpose not constituting direct participation.<sup>168</sup> The increased aid includes separately funded transportation, minor construction, equipment repair and upgrade, and limited aerial and ground reconnaissance.<sup>169</sup>

Three other areas are important to show the retreat from strict adherence to traditional segregation of military and civilian activity. The 1981 statute subordinated any aid provided to military preparedness.<sup>170</sup> A recent modification eased the restraint. The Department of Defense may sacrifice preparedness in the short term if justified by the importance of the law enforcement mission.<sup>171</sup>

The sense of Congress clause evidences the legislators' willingness to disregard posse comitatus notions. It urges the Secretary of Defense and the Chairman of the Joint Chiefs of Staff to "ensure the maximum contribution of the armed forces to the national counter-drug effort."<sup>172</sup>

Congress also designated the Department of Defense the single lead agency for detection and monitoring of aerial and maritime transit of illegal drugs into the United States. The support role still predominates. However, to carry out the interdiction mission military personnel may intercept any vessel or aircraft detected outside the United States. They can then identify it and direct it to awaiting civilian officials. The military interceptors may even "hotly pursue" the

suspect into the land area of the United States if required.<sup>173</sup>

The House of Representatives was ready to push even further. They provided the armed services, particularly the Navy, the ability to make arrests outside U.S. borders. The Senate approved a similar provision. This "high seas" apprehension authority was only deleted after the Armed Services Committees were assailed by Posse Comitatus Act supporters in a rare pre-conference hearing.<sup>174</sup> The message is clear. Congress is poised to significantly expand military operations in support of drug interdiction. The military must be prepared to implement congressional action with lucid and informative regulations. A challenge currently unmet.

C. Implementing the Legislation.

Regulations in the area of support to civilian law enforcement suffer from the ambiguities of the statutes that sired them. They have one additional fault; they are not current. The Department of Defense directive does not ameliorate the tension between authorized actions and prohibiting language.<sup>175</sup>

1. Department of Defense Regulations.-- The directive reflects the accretion method of drafting. It begins with a recitation of the 1878 Act.<sup>176</sup> Pre-1981 concepts, like the military purpose doctrine,<sup>177</sup> are included without necessary refinement.<sup>178</sup> The primary military purpose test still has vitality.<sup>179</sup> The directive, however, tests all operational support missions for a military training objective as evidence of a military purpose.<sup>180</sup> This requirement improperly perpetuates the restrictive application of the test. Under the newest statutory changes, drug support operations need not meet a primary purpose standard.<sup>181</sup>

The better view is that the military purpose doctrine applies expansively. It frees activities from the Posse Comitatus Act if there is a valid primary purpose. It does not restrict statutorily authorized actions, particularly counter-drug operations, which do not have an independent military purpose. The primary purpose test should expand, not limit, opportunities for support. The Department of Defense regulation, and the service implementing instructions,<sup>182</sup> need to

clearly and affirmatively explain this relationship between old doctrine and new statute.<sup>183</sup>

The mix of signals is understandably like those in the legislation. The directive encourages defense agencies to provide training. That does not, however, permit large scale or elaborate training.<sup>184</sup> The armed services should provide expert advice to law enforcement officials. The directive forbids such advisors from becoming regularly or directly involved in activities that are fundamentally civilian law enforcement operations.<sup>185</sup> This "giveth with the right hand while the left hand taketh away" wording leaves the propriety of most aid unclear.

The directives require some updating. They do not reflect recent congressional attempts to push the Department of Defense into a greater anti-drug role. The provisions on transportation of civilians do not consider the increased opportunities included in the latest defense authorizations.<sup>186</sup> Drafters must revise the requirement throughout the directive conditioning support upon ability to maintain military preparedness. Congress lessened that standard in 1990.<sup>187</sup> Similarly, including interdiction of vessels in restricted direct

assistance is inaccurate.<sup>188</sup> Congress has provided for air and naval interdiction in the 1988 amendments and accordingly removed the prohibition.<sup>189</sup> A regulatory rewrite is in order if field operations are to follow Congress' expanded concept of operations.

Where the language departs from the statutes, the regulation achieves mixed results. The requirement that training take place at a location where there is little likelihood of a law enforcement confrontation is functional.<sup>190</sup> The drafter may have drawn the idea from some of the commentators and congressmen who suggest the practical aim of posse comitatus is avoidance of face-to-face contact between military personnel and civilians.<sup>191</sup> This is a more workable standard than direct or indirect support.

The directive also contains a closely related, but must less tangible notion. In the catch-all provision, the regulation authorizes appropriate actions that do not subject civilians to "military power that is regulatory, proscriptive or compulsory."<sup>192</sup> This seems to embrace the same idea of keeping military members out of confrontations with the public while assisting in law enforcement. Unfortunately, the directive used



the hazy concept of proscriptive power. How this principle relates to the direct participation prohibition is unclear.<sup>193</sup> The directive is not helpful. It uses both concepts.

Recent action eases some of the difficulty with outmoded and ambiguous regulatory guidance. The Secretary of Defense delegated authority to authorize certain support activities to the Commander-in-Chief of the involved command. The delegation messages include a more comprehensive and operation-specific set of guidelines for proper action.<sup>194</sup> They incorporate current legislation and detail appropriate actions.

The delegation message draws practical lines. For example, as part of planned training in a designated U.S. drug interdiction area, a military operation may use motion detectors. The unit may not target in advance or continuously observe people, buildings or vehicles. Civilian authorities may, however, receive reports upon initial detection of buildings or movements of people and vehicles. The delegation message updates the regulation concerning transport of law enforcement officials. It authorizes transportation in most situations. The authorization

does not include tactical support of ongoing domestic law enforcement operations and activities where hostilities are imminent.<sup>195</sup> These specific references to likely situations are a great improvement over the directive's reliance on military purpose or direct and indirect support guidelines.

What is the effect of ambiguity in congressional and departmental guidance? Reduced operational response time. And a dedication of valuable resources to request analysis and legal review. Negotiating the maze of statutory, judicial and regulatory directives ties up support for law enforcement.<sup>196</sup>

2. Administrative Application.-- The delegation of authority solves some of the problem. A great deal of its practicality is attributable to its purpose: to give lower level commanders the ability to approve the activities most clearly authorized. The Secretary reserves approval for close cases. The delegation requires higher level approval for situations involving most operations on private lands, deployment of intelligence personnel, and some uses of high-technology imaging assets.<sup>197</sup> These hard calls usually require application of the least clear portions of the

statutes to situations unanticipated by the drafters. They also have the greatest potential for diplomatic or public relations difficulties if military involvement is improper.

Commands send these requests to the Department of Defense Office of General Counsel for comment. This leaves the Secretary's lawyers with the tough task of sorting through the legislative twists and judicial turns to divine whether the Posse Comitatus Act bars a proposed operation.

One of the toughest of these decisions is when to use the military's extensive remote sensing capabilities in support of civilian law enforcement. The legislative guidance is unclear. It is difficult to say Congress meant the language prohibiting direct involvement in searches and seizures to apply. Finally, the courts have not determined whether the use of remote sensing equipment is even a search.

The Department of Defense Office of General Counsel has been reluctant to permit the use of imaging equipment. The Secretary of Defense has denied requests to use of airborne infrared detectors over private lands.<sup>198</sup> The difficult legal question raised

provides a mix of statutory and constitutional interpretation. It therefore makes an excellent case study for analyzing the boundaries of the Posse Comitatus Act's application.

### III. Real "War" Scenario

The requests from civilian agencies for infrared technology typify the area where military support is most helpful: enhanced sensing. Law enforcement agencies need military equipment.<sup>199</sup> The nature of their operation requires observation of large areas with few personnel. Many drug smugglers seek the cover of darkness. That is why border patrol representatives cited infrared night surveillance devices as the most effective tools they have ever had.<sup>200</sup> Sensor systems and imaging are the force multipliers essential in interdictions along the border.<sup>201</sup> Their remote detection capability allows for the coverage and safety needed by the slim civilian border watching force.

#### A. Enhanced Sensing Technology.

The exotic sensing devices proposed for use in the high-technology drug war can evoke emotional responses. Images of George Orwell's 1984 are difficult to avoid.

In reality, the capability of devices to reveal intimate information varies greatly among techniques. An understanding of what sensors do is important. The assumptions made about a system often determine the outcome of a privacy invasion analysis. That justifies a look at some remote sensing assets with potential drug interdiction application.

Forward-looking infrared (often called FLIR) measures the heat differences of various surfaces at a distance. It records their emanations at the thermal infrared band on the electromagnetic spectrum.<sup>202</sup> The images which result are similar to photographs which record the visible spectrum. Because the thermal signature radiates into an object's surroundings, the photographic detail is not available in the infrared. The technique reveals the surfaces which are generating the most heat. FLIR produces no direct information about what lies beneath a surface.

Infrared detectors are useful for two aspects of drug interdiction. Police use the heat signature to infer unusual heat level for a structure.<sup>203</sup> They can then factor this information into a determination that drug production is the source. Both marijuana growth

lamps and methamphetamine production generate heat. Agents may also use infrared for tracking. The device can detect the exhaust of most vehicles and vessels at night or through haze by the thermal signature generated.

Night vision goggles, startron scopes, and similar devices amplify ambient light allowing enhanced viewing in the dark. Because they rely on reflected visible light, they provide no information which would not be visible to an observer using a flashlight. The equipment is not very effective at viewing dark interiors for the same reason. In open areas during low light it does reveal details not visible to the naked eye.<sup>204</sup>

Simpler, in that they use only the visible spectrum, are the photoimaging technologies. Enlargement, detail or color enhancement, and filtering, often with aid of a computer are common techniques. Each process provides more information from a camera or optical scanner than unaided vision. The most sophisticated application of this technology is in satellites. Most military uses are classified and, therefore difficult to discuss.<sup>205</sup>

Various other useful devices do not rely upon the electromagnetic spectrum. Engineer units may use motion sensors to detect activity in tunnels and caverns. They work on seismic detection system similar to sonar in water. The sensor generates a small shock wave. Its echo reveals the location of subsurface openings and structures. Tunnel finders have proven surprisingly useful. Army detection teams unearthed a notorious tunnel used for cross-border drug shipments ending in Douglas, Arizona.<sup>206</sup> Ground radar and other motion sensors inform the user of movement in an area. They reveal limited detail about the source of the motion.

The final system has both high- and low-technology forms. While not common in military equipment, mechanical chemical and vapor detection systems are available. The West Germans offered to deploy gas detecting vehicles for Operation Desert Shield.<sup>207</sup> Available and commonly requested are canine detection systems: military working dog teams. Drug detection dogs and their handlers are extremely valuable in the detection of drugs, chemicals and weapons.<sup>208</sup>

B. Sharper Image Searches.

Even a casual student of the Constitution can envision the search and seizure issues complicating the use of any of these futuristic wonders.<sup>209</sup> The conflict between advancing technology and individual privacy has been with us since Galileo pointed his telescope other than toward the heavens. It has courts concerned.<sup>210</sup> It has Congress concerned.<sup>211</sup> Neither has provided a neat solution.<sup>212</sup>

The analysis of any military sensing device's propriety includes two hurdles. The statutory posse comitatus scheme must allow the action. It must also pass constitutional muster.

1. Fourth Amendment Searches and § 375

Searches.-- The word "search" used in the prohibition on direct military participation in "in a search, seizure, arrest, or other similar activity," has three possible interpretations.<sup>213</sup> First, the term could be more restrictive than the traditional Fourth Amendment sense. That means Congress intended the Posse Comitatus Act's criminal sanctions to apply to some actions which the Constitution would not bar as unreasonable searches. The 1981 changes, while not clear, appear to move away from this narrower view.<sup>214</sup>



The use of the word could also show Congress meant to make searches for posse comitatus purposes coextensive with the Fourth Amendment meaning. That conclusion would imply that criminal penalties are triggered any time a search is constitutionally improper. In these first two interpretations, the Secretary of Defense would have to deny any search request he thought infirm to remain clear of the Posse Comitatus Act.

Finally, the word "search," is tied to "seizure, arrest or other similar activity" in the statute. It may be shorthand for a composite notion of law enforcement areas rife with undesirable military-civilian contact. Thus, some actions which are Fourth Amendment searches may not violate the Posse Comitatus Act as circumscribed by congressional action. If this is the case, the Secretary of Defense has no basis for denying requests solely on grounds that courts may later rule them unconstitutional. If Congress permits the requested support activity, Defense Department imposition of a "reasonable search" requirement is overreaching.

There are many practical and legal reasons for authorizing equipment use which potentially constitute a Fourth Amendment search. The courts are expanding "good faith" exceptions and "warrantless searches." They have limited application of the exclusionary rule<sup>215</sup> and "fruits of the poisonous tree" doctrine.<sup>216</sup> Evidence technically violative of the constitution has aided investigations and resulted in convictions. This trend makes imprudent giving an opinion on the propriety of any evidence gathering method. It also means rationale exist for the Department of Defense to approve techniques which clear only the posse comitatus restraints.<sup>217</sup>

2. Congressional Intent.-- If possible, the legislative history is even less clear about what Congress meant to prohibit in § 375 than the confusing intent described in the preceding sections. The debates and hearings never discussed "search" independent from "search, seizure, arrest or other similar activity". In fact, the report analyzing the bill refers only to "seizures and arrests."<sup>218</sup> The hearings on the proposal show a similar emphasis. Congress' concern is with the direct contact with

civilians in seizures and arrests, not the remote operation of equipment which might be a search.<sup>219</sup>

Another telling point amid the scant history may be the rejection of a modification by the reporting committee. Proposed by the Department of Justice and the Department of Defense, it would have prohibited the supporting use of military equipment within U.S. territory.<sup>220</sup> In declining the restriction, the committee noted that it did not want to hamper use of "radar or similar surveillance devices inside the United States."<sup>221</sup>

Similarly, the Congress intended the express grant of authority to provide operators along with military equipment to give federal agencies devices which were "too sophisticated" to allow practical training of civilians.<sup>222</sup> Representatives considering the authorization bill were aware that sensing equipment is the sophisticated military hardware most sought by civilians.

Some analysts have avoided these points, focusing instead on the committee report's recitation of broad statements of concern with the historic separation of military and civilians.<sup>223</sup> Members of the 1878 Congress

objected to troops registering freed slaves to vote. Concentrating on this imagined history of "strong American antipathy towards the use of the military in the execution of civil law"<sup>224</sup> is neither keen study nor prudent policy.<sup>225</sup> It is equally arguable that the search referred to in the statute means a generic description of confrontational situations rather than a constitutional search.

A consideration of underlying principals support this interpretation. Even if the Congress did not mean to emphasize avoiding the confrontation inherent in arrests and seizures, it is a rational place to draw the line limiting military involvement. It allows for the support of civilian law enforcement to the greatest extent possible without the friction of confrontation.<sup>226</sup> Military personnel are familiar with similar guidelines. Commanders emphasize situational responses and conflict avoidance in peacetime rules of engagement.<sup>227</sup> Likelihood of confrontation is a workable refinement of the direct participation concept.

Under this approach, all the high-technology equipment discussed would clear the posse comitatus

hurdle. Enhanced sensing is after all remote. One of its valuable qualities is its distance from the observed area. The least clear cases come with night vision scopes, motion sensors and working dog teams. The use of these techniques normally places the operator in closest potential contact with civilian suspects and locations.<sup>228</sup>

The other devices have minimal confrontation opportunity. They simply do not involve military members in the sort of "direct participation in searches, seizures and arrests" envisioned by § 375. The fears which the prohibiting language embody are of M16-toting soldiers conducting "stop and frisk" on the populace. Congress did not mean the statute to reach the infrared sensing aircraft at five thousand feet.

3. Extraterritorial Limits on the Fourth Amendment.-- One significant circumstance makes both posse comitatus and constitutional inquiry irrelevant. When the operation is to occur outside of U.S. territory neither restriction applies. As discussed earlier, overseas the Posse Comitatus Act loses its reason for being. Military members are not supplanting U.S. civilian law enforcement.<sup>229</sup>

Recent court decisions come to the same conclusion about the Fourth Amendment. The Supreme Court held the Amendment's prohibition on unreasonable searches and seizures and search warrant requirement do not apply outside the United States.<sup>230</sup> The Court distinguished the trial-related rights of the Fifth and Sixth Amendments.<sup>231</sup> While alien defendants may have the right to suppress an unwarned confession in a U.S. court, the fruits of a warrantless search are admissible. The Verdugo-Urquidez decision notes the deleterious results of extraterritorial application on the Executive and Legislative Branches. The Court expressed concern with hindering not only law enforcement, but foreign policy and military operations which might result in "searches or seizures" as well.<sup>232</sup> The use of this language, while dicta, implies the Supreme Court sees neither posse comitatus nor constitutional bars to military searches abroad.<sup>233</sup>

C. Applying the Fourth Amendment.

Constitutional concerns are still of some interest for domestic activities. Current Department of Defense procedures test equipment requests for judicially-defined search implications.<sup>234</sup> Additionally, from the

perspective of fashioning a practical civilian support policy, Congress may wish to consider the ultimate success of prosecutions. It does little good to authorize military operation of sophisticated equipment in support of law enforcement officials if it actually hampers their ability to jail drug runners.

How then does use of these technologically-advanced sensors fit into Fourth Amendment law? The study of searches begins with a singular principle: preservation of reasonable expectations of privacy.<sup>235</sup> While the Supreme court has tried to maintain a uniform application of the rule, separate lines of analysis have emerged for various observation techniques.<sup>236</sup>

1. Protection of Privacy.-- Any journey through the pathways of the Fourth Amendment begins with a single case: United States v. Katz.<sup>237</sup> The Katz decision recognized that advances in technology required the identification of new interests to protect privacy rights. It proposed what has become a two-part requirement for protection: (1) The person must exhibit an actual expectation of privacy (the subjective test), and (2) that expectation must be one that society is prepared to recognize as reasonable

(the objective test).<sup>238</sup> Only examination of a person or area meeting both these criteria trigger the Fourth Amendment's reasonable search and warrant provisions.

The first test excludes from protection those instances where an individual does not show that the place or thing observed is to be private. Courts have not frequently devoted attention to this prong of the analysis.<sup>239</sup> They tend to join it with the second test.<sup>240</sup> The subjective expectation concept may have greater vitality for remote sensing cases. The devices used often detect emanations such as thermal signatures or chemical vapors. The producer of these detectible emissions does not evidence an intent to prevent their discovery.<sup>241</sup>

Decisions emphasize the second test in the development of case law since Katz. The Supreme Court has decided myriad cases limiting the expectation of privacy reasonable to society.<sup>242</sup> While determining reasonable expectations of privacy may be "our lodestar" in the area,<sup>243</sup> the application of the test to remote sensing has resulted in no bright line rules.<sup>244</sup> The Court's fact-specific decisions on sense-enhanced searches provide little guidance for police, lower



courts or interpreters with posse comitatus concerns.<sup>245</sup> Assumptions made about the nature of the technology concerned and the privacy model invoked<sup>246</sup> usually determine holdings .<sup>247</sup>

The best view is that most contemplated sensing operations with military equipment are not searches. Applying the closest possible factual determinations, rather than following the "lodestar" and a set of paradigms, results in this conclusion. It is also in line with the Supreme Court's move away from restrictive Fourth Amendment holdings.

2. FLIR and the Fourth Amendment.-- A guide for court treatment of military infrared sensing equipment is the handling of civilian infrared devices. In the recent well-reasoned district court case of United States v. Penny-Fenney, aerial use of an infrared detector over private residences was held not to be a search.<sup>248</sup> The police used a FLIR device to confirm informant-supplied information that Penny-Fenney was using heat-generating grow lights as part of her home marijuana business. A helicopter-borne civilian operator flew at normal altitudes and recorded the

relative temperature levels of Penny-Fenney's house compared to adjacent homes.<sup>249</sup>

The court first focused on the lack of any intrusion in the use of the instrument. It only detected infrared radiation from the surface of the buildings. The device measured external temperature differences by gauging the electromagnetic radiation emanating from the surface. Thus, the court concluded the target of the examination was heat coming from the building.<sup>250</sup> This is all that FLIR can "see."

The next inquiry, as Katz would suggest, dealt with Penny-Fenney's subjective expectation of privacy in the heat. The court found the heat to be "waste" or "abandoned." It was an incidental byproduct of the marijuana cultivation which Penny-Fenney made no attempt to control or impede. She voluntarily vented the heat outside the home, exposing it to the public. Penny-Fenney therefore demonstrated no actual expectation of privacy in the heat.<sup>251</sup> If she ever had shown a subjective expectation, the court found she abandoned it when allowed the heat to escape.

The second Katz prong also failed Penny-Fenney. Citing United States v. Greenwood,<sup>252</sup> the garbage at the

curb case, the court ruled that a privacy expectation in thermal energy released into the atmosphere was not one which society would be willing to accept as objectively reasonable.<sup>253</sup> That the exposure was heat-sensory and an observer could only detect it by use of FLIR does not change that conclusion.<sup>254</sup> Analogous use of tracking devices,<sup>255</sup> and particularly, drug sniffing dogs,<sup>256</sup> demonstrate that properly used sense-enhancers do not make an observation a search.

The nature of the detection is important. The processes reveal no intimate details.<sup>257</sup> The dog, the tracker, and FLIR all indicate only general, non-communicative, information.<sup>258</sup> Only inferences made from their results provide any particulars. This is simply the normal evidence gathering process. Police may visually identify potential heroin dens by seeing the needle-bearing junkies leaving. They may FLIR-identify a potential drug growing or production site by "seeing" its heat. The inferential nature of the following probable cause determination is the same.

Infrared deals solely with a physical fact about the outside of the house. It directly reveals no private conversations, no personal documents, no secret

items, and no activities in the house. The use of infrared reconnaissance does not constitute a Fourth Amendment search.<sup>259</sup>

3. Chemical Sensing.-- While researchers develop more esoteric systems the primary chemical sensors provided to civilian law enforcement are military working dog teams. Drug sniffing dogs bear a close conceptual resemblance to the infrared sensor. Both key on one narrow datum of detection. They also perform their sensing with minimal intrusion. With chemical sensing, the detected material has dispersed physically . This makes for a more tangible target than FLIR's electromagnetic emanations. These factors lead the Supreme Court to condone their use without Fourth Amendment implications.<sup>260</sup>

The Court may have limited the Place ruling to the public location from which the sniff occurred and other circumstances surrounding the dog's use in that case.<sup>261</sup> Entry of the dog and handler into a protected area will trigger the Fourth Amendment, even though the sniffing is not a search.<sup>262</sup> The Court had no difficulty with their use from an area to which access is allowed.<sup>263</sup> Future rulings should be similarly treat use of any

mechanical chemical sensor or litmus paper for drug detection.

4. Enhanced Views.-- Photographic enhancement, night vision devices, satellite imaging, flashlights and binoculars are conceptually similar.<sup>264</sup> All essentially work like some combination of flashlight and telescope, illuminating and enlarging what one sees. Courts view them more critically than FLIR and dogs. The visual enhancements reveal much greater detail about a wider breadth of information.<sup>265</sup>

Circumstances so highly influence a judge's determination of reasonable expectation of privacy in these uses it is difficult to discern rules. Often crucial are the location of the observer and the object or person observed.<sup>266</sup> If the viewing is done from a proper, usually public, location and examines only building exteriors, use of the enhancement does not make it a search.<sup>267</sup> Decisions even sanction some interior viewing if it reveals no details of a residence.<sup>268</sup> A court is unlikely to call military imaging or night vision equipment not pointed in a residential window a search.

5. Motion Sensors and Seismic Detectors.-- Ground radar, tunnel finders and similar instruments are constitutional hybrids. Like FLIR and chemical sensing they do not provide any detail about what they observe. It is an indistinct "something moving," which triggers the motion detectors. Tunnel finding teams can tell the possible existence of a subterranean opening, but not its shape or contents. Like visual enhancers users can direct them inside homes or base them at improper private locations.

As an additional complication, they are different from the other types in function. They issue a wave, radar or sound, which echoes to provide information from the target. This makes them physically intrusive. The Supreme Court abandoned lack of physical trespass as defining the outward bound of privacy.<sup>269</sup> It is not clear that the intrusion of these devices' waves is free of Fourth Amendment concern. No courts have dealt directly with these forms of remote sensing. Their safest use is in open areas away from residences.<sup>270</sup>

Most well-conceived uses of military hardware are not constitutional searches. Within bounds which certainly do not hinder their effectiveness,

sophisticated military equipment can legally meet the needs of law enforcement officials. High-technology weaponry passes muster under the dictates of the Fourth Amendment. The Posse Comitatus Act does not preclude their use even under a constitutional search standard.

#### IV. Solutions: Untying the Three-Part Knot

The complex connection between the posse comitatus rules of Congress, the Department of Defense, and the courts mean that correction in one sphere will help in all. Clarifying the use of the military in the drug war should be the aim of each branch. Any body can untie the knot.

##### A. The Judicial Fix

If searches remain a defining notion under the statutory posse comitatus restrictions, then the courts need a brighter "lodestar." Rulings must seek to make the wavering guide of "reasonable expectations of privacy" distinct and predictable. Every Fourth Amendment commentator implores the Supreme Court to unify the conflicting applications of Katz doctrine. Usually the aim is to limit police conduct or promote

prosecutions. The military needs a clear line to avoid criminal liability.

The use of technological aids is particularly muddled. The Court could help by blessing some method of analysis. It must be more detailed than simply re-examining the first principles of privacy in every case. Producing a practical model would prevent so many reasonable minds from differing. A start might be to recognize several of the common threads in recent case law as approved search-defining factors.

First, examine the intrusiveness of the activity. The less the method's intrusion, the less the need to call it a search. This factor is important because part of what the Fourth Amendment protects persons from is the sense of "violation" when police conduct a search.

Second, consider the nature of the information obtained by the observation. Certain categories deserve more protection from discovery than others. Conversations and similar communicative acts deserve the highest protection. Other personal conduct society affords less privacy. Included might be location, movement and actions not amounting to communication.



Finally, least protected is mere indirect or non-personal information. The reduced privacy class includes physical characteristics, non-visual electromagnetic emanations and physical diffusion. This taxonomy does not replace privacy theory.<sup>271</sup> It simply provides a framework for identifying privacy interests in the enhanced sensing realm. Some basic lines must be drawn if "search" is to have any pattern of meaning. Without firm conceptual ground on which to stand, no defense officials will leap to aid police in the drug war. A misstep could land them in jail.<sup>272</sup>

B. The Legislative Fix

The journeyman's work should be done in Congress. A statutory problem demands statutory changes. First, Congress must repeal the language of the 1878 Posse Comitatus Act.<sup>273</sup> Its criminal sanction and fine are an anachronism. They do no more than hamstring the desirable endeavors at military support to law enforcement. Vague language and legislative intent have undercut the later piecemeal attempts at clarification. Congress should work from a clean slate.<sup>274</sup>

1. The Civilian-Military Relationship.-- A fresh study can rectify several improper assumptions about civilian-military relations. The notion of military separation from civilian affairs is not constitutional. Historically, the Founding Fathers had reservations about standing armies. They did not, however, embody them in the Constitution. That document gives the Executive Branch extensive authority to take military measures, subject to the check of Legislative Branch power. All walls dividing military and civil activity have their source in legislative and executive action, not the Constitution.

The emotional power of appeals to "long standing tenets" is undeniable. It does not aid rationale law-making. For every allegory of colonial revolt there is an equally accurate historic use of the military to restore order. These concepts lead to nebulous conclusions.

No unique harm to the American polity results because of military involvement in unpopular civil enforcement actions. Thus, use of federal tax collectors to enforce unpopular Reconstruction laws would have equally upset southerners. The public

equally reviled the dubious collection of dossiers on citizens whether done by the Army or the Federal Bureau of Investigation. Yet opponents of Posse Comitatus Act repeal continue to hollowly evoked these instances as evidence of a continuing aversion to military involvement in civil activities. A better approach is to strike a purposeful balance between military obligations and civilian requirements. When one views questions about military enforcement of civilian laws independent of their political history, it becomes clear that soldiers can police civilians. The difficulty lies in determining if they should. Unbiased reflection shows military personnel to be no more likely than civilians to conduct illegal searches, disregard arrest rights, or resort to inappropriate violence. A better understanding of military affairs simply answers these common complaints.

Operations including those in support of law enforcement use rules of engagement which provide guidance like police policy.<sup>275</sup> Excellent military discipline, training, and equipment tends to minimize variance from orders. The critics must remember that the military not only trains soldiers to kill, but when

to kill. The frequent assertions that the military cannot perform the enforcement mission are misguided.

Opponents of military support for civilians raise a few better policy reasons for why the military should not enforce laws. All, however, are answerable. The idea that civilians will lose respect for the military if it enforces unpopular laws comes straight from the Posse Comitatus Act's Reconstruction roots and "Revenue-er" backlash. The response is democracy. The military only enforces laws representing the will of the majority in Congress and the popularly elected President.

The often foreseen politicization of the military is outdated and addressable. Military aid to law enforcement does not mean re-establishment of soldier posses called up by local sheriffs. Civilian federal authorities review and direct support requests at the highest levels of command. The argument that support diminishes civilian control of the military fails for the same reason. Local level commanders must act within their delegated authority. The system of control at the national command authority level assures civilian oversight. Removal of the current ambiguity

surrounding support for law enforcement is the surest measure to be sure commanders carry it out effectively and lawfully.

2. Replacing The Posse Comitatus Act.-- On the clean slate left by the Act's repeal Congress should draw the clearest possible specific statements of desired military action. Affirmative grants should state their bounds. Any new provision must avoid current statute's mix of "provide personnel" and "do not directly support" language.

The legislation could set out desired action and corresponding limits for each of intelligence, personnel, facilities, and training. Equipment must have subdivisions for loan and grant programs. Congress should set up separate guidelines for any materiel with special concerns like classified components, hazardous substances or complex operation. Sophisticated sensing devices with Fourth Amendment implications also deserve an individual sign of congressional intent.

Tailoring the statement of purpose, grant and limit for each type of aid avoids the ambiguity plaguing the present statute. A new straight-forward

approach would no longer require twisted application of concepts like "direct support" across dissimilar situations. Some application of the "most restrictive" constraint to mixed-class situations may be necessary. Regulations can provide that level of detail.

Development of a new, more practical standard of permitted military involvement in civilian activities is crucial. Without the shoals of a criminal statute to worry about the guidance can be more flexible. It can suggest a level of interaction rather than proscribe conduct. It can be functional. And perhaps most important, it can be readily discernable to those not steeped in Fourth Amendment law.

Avoidance of confrontation between military personnel and civilians already underlies much of the existing policy. Congress could shape each category of support with that model in mind. Thus, the legislation would favor training on military facilities over on-the-spot advising. Congress could express a preference for unobtrusive remote sensors over the more face-to-face use of a working dog team. Transfer of equipment along with training would have higher priority than provision of personnel to operate loaned items.

The distinctions should focus on promoting only minimal, temporary, operationally-justified, contact between military and civilian personnel and property. The current differentiation by service, duty status, location, would become irrelevant. The Department of Defense could allocate resources by need rather than by legal fictions created to justify actions contrary to an archaic statute.

C. The Administrative Fix.

If Congress and the courts do everything suggested thus far, all that remains for the Department of Defense and the Chairman of the Joint Chiefs must is to turn the legislative guidance into workable reality. Freed from concerns about breaking the law if a commander misinterprets a provision, the regulations can become more practical. They can expand on the situational concept. Rules of engagement can incorporate the boundaries drawn by an affirmatively stated statute. Removal of confusion at the command level eliminates errors at the front lines. Clearer statutory language complemented by a uncomplicated regulation will result in less hesitation and closer

adherence to Congress' concept of military support in the war on drugs.

If Congress will not fix the statute, the Department of Defense can still improve its directive. With the ambiguity in the current legislation, building guidance upon the confrontation-avoidance theory is not contrary to congressional purpose. Lower level commanders would receive the same benefits in clarity and operational practicality. For an updated directive, the sort of how-to approach used in the current delegation of authority should replace the recitation of conflicting statutory provisions of the statutes.

The Secretary should conclude, at a minimum, that proper use of enhanced sensing technology is not barred by the current statute. Simply state that §375 does not prohibit military operation of sophisticated technology. The Department of Defense can support that interpretation two ways: because the equipment's use is not a Fourth Amendment search or because the statute a constitutional search definition is not required. Even a small step in either direction would help



fulfill Congress' legitimate vision of meaningful military participation in the drug war.

## V. Conclusion

The posse comitatus knot needs untying. Congress or the Administration must act quickly. Each day of delay is another day of drug abuse's advance on America's well-being. Bringing advanced military technology to bear in the war on drugs is popular, practical and legal. Increasing the use of applicable warfighting hardware makes the drug interdiction effort a full beneficiary of any "peace dividend." It also anchors the low-intensity end of the conflict continuum by recognizing the narco-terrorist and drug insurgent threat to national security.

If there is to be "no Vietnam" in the war against drugs, the Posse Comitatus Act's unwarranted impediments to appropriate military support must be removed. Half-hearted measures are senseless the face of civilian law enforcement's dire needs.<sup>276</sup> "Do we really have the level of commitment that we want to make as a nation and as a people: Are we investing as much in the war on drugs as we would like? If not,

then we have got to reassess and adjust."<sup>277</sup> We must release the Posse Comitatus Act's grip on warfighting assets essential for the fight against illegal drugs.

#### ENDNOTES

1. But it could be. See generally Tom Clancy, Clear and Present Danger 343-86 (1989) (envisioning Special Forces anti-drug mission); Tom Clancy, The Cardinal of the Kremlin 152-155 (1988) (describing use of satellite imaging).

2. Many in Congress have called for at least this sort of role for military forces. The late Representative Pepper at a hearing in his Miami district concluded that the only solution to drug problem was "to make it a war carried on by . . . those who are the ultimate defenders of our country. Once we get the Armed Services of our country to act upon this as if it were an invasion in war time, . . . we will mobilize the might that is necessary." The Role of the Military in Drug Interdiction: Joint Hearings Before the House and Senate Armed Services Committees and the Investigations Subcommittee and the Defense Policy Panel of the Committee on Armed Services, House of Representatives, 100th Cong., 2d Sess. 73 (1988) [hereinafter Role of

the Military in Drug Interdiction] (Statement of Rep. Pepper).

3. Id., at 74.

4. President Nixon described drug abuse as a "national emergency" in a message to Congress and called for a "total offensive." Steven Wisotsky, Beyond the War on Drugs in The Drug Legalization Debate 103 (James Inciardi ed., 1991) [hereinafter Drug Legalization Debate].

5. President's Radio Address to the Nation, 18 Weekly Comp. Pres. Doc. 1249 (October 2, 1982); President's Message Announcing Federal Initiatives Against Drug Trafficking and Organized Crime, 18 Weekly Comp. Pres. Doc. 1311, 1313-14 (October 14, 1982).

6. Notwithstanding the circa 1983 bumper sticker which proclaimed, "THE WAR ON DRUGS IS OVER . . . DRUGS WON!". Colonel Michael C. Wholly, Military Involvement in the War on Drugs: Quo Vadamus? 1 (16 June 1989) (unpublished manuscript, on file with the Defense Technical Information Service).

7. See generally Ronald K. Seigal, Intoxication: Life in Pursuit of Artificial Paradise (1989) (espousing an enthusiast's view of the history of altered states).

8. See James A. Inciardi, The War on Drugs: Heroin, Cocaine, Crime and Public Policy 1-48 (1986) (viewing drug abuse as the problem); David F. Musto, The American Disease: Origins of Narcotic Control (1973) (viewing control as the problem).

9. Although the quantity of illegal drugs seized by authorities has risen dramatically over the past several years, studies show the total supply available for retail sale has still increased. Simple economics dictate that street prices should go down. Surveys show they have fallen significantly, perhaps by as much as one-third. Peter Reuter, Can the Borders Be Sealed? in Drugs, Crime and the Criminal Justice System 13, 14-15 (Ralph Weisheit ed., 1990). See also Staff of the House Committee on Government Operations, The Role of the Department of Defense in the Interdiction of Drug Smuggling Into the United States 5-9 (Comm. Print 1990) [hereinafter Role of DOD in Drug Smuggling].

10. Office of National Drug Control Policy, What America's Users Spend On Illegal Drugs 4-5 (1991).
11. Steven Jonas, The U.S. Drug Problem and the U.S. Drug Culture: A Public Health Solution, in The Drug Legalization Debate, supra note 4, at 161, 166-67.
12. See generally Drugs, Crime and the Criminal Justice System, supra note 9 (discussing in separate articles drugs and homicide, crack and violence, drug use and delinquency, driving while intoxicated, AIDS, and even drug abuse and corruption among police officers).
13. The White House. National Drug Control Strategy 12-13 (1989) [hereinafter Drug Strategy 1989]. The 1991 report showed a reduction in frequent cocaine use but cautioned that "it would be a grave error to conclude that our task is over." The White House. National Drug Control Strategy 18 (1991) [hereinafter Drug Strategy 1991]. In the National Institute on Drug Abuse's National Household Survey on Drug Abuse, 662,000 Americans regarded themselves as frequent cocaine users. An additional 4,143,000 respondents

reported occasional cocaine use. Just under 13 million were currently (within 30 days of response) using illegal drugs of any kind. Id., at 5-10. Drug treatment efforts, community action and educational programs report mixed results. Id., at 45-74.

14. Michael Isikoff, International Opium Production Up 8% Last Year, Wash. Post, March 1, 1992, at A4.

Estimates of world cocaine production for 1991 were between 995 and 1,170 metric tons (up from 873 metric tons in 1990). Total opium production reached 3,819 metric tons (up from 3,520 metric tons in 1990 and nearly double the mid-1980's level).

15. Although not taxonomically precise, I also include in "interdiction" the capture of "laboratories" in the United States which process "crack" cocaine or heroin, or produce methamphetamine. Similarly, seizure of "homegrown" marijuana falls within this category because it occurs within U. S. territory.

16. See Drug Strategy 1991, supra note 13, at 14-15, 94; Role of DOD in Drug Smuggling, supra note 9, at 5-6.

17. Drug Strategy 1991, supra note 13, at 45-74.

18. The "crack" form of cocaine, heroin, and the latest smoked methamphetamine concoction termed "ice" are among the most addictive substances known to science (along with nicotine, but that could provide the basis another entire article). Breaking the habit with treatment or encouraging abstinence is a daunting task in the face of testimonials about the pleasurable effects of drugs. In one Court of Military Appeals case dealing with "crack"

[a]ppellant described the addictive lure of the drug as follows:

It--it's--it's hard to explain. If you take every Christmas, every Fourth of July, every New Year's, every orgasm that you've ever had in your entire life and multiply it several thousand times and then cram it into your body in an instant, that was [the] pleasure of cocaine--crack cocaine.



Crack cocaine ruled appellant's life; his wife left him; sleep was short and far between; and his automatic teller card financed an addiction that depleted his savings account. This behavior persisted until appellant found himself one morning on the floor of a "crack house" in Washington, D.C. He had smoked an entire paycheck on a crack cocaine binge. At this low point, he turned for help. He sought out the drug-rehabilitation center at Fort Myer, Virginia. There he requested treatment and was accepted into the Army's Alcohol and Drug Abuse Prevention and Control Program (ADAPCP). The program lasted 6 months, on an out-patient basis. Appellant attended daily counseling sessions and nightly meetings of Narcotics Anonymous. Family and friends rallied to his assistance: His older brother, an Air Force officer, took 30 days' leave to help appellant overcome his addiction. However, all efforts failed. From the time appellant entered the ADAPCP,

he came-up positive on all ten drug tests  
conducted on him.  
United States v. Cooper, 33 M.J. 356, 357 (C.M.A.  
1991).

19. See James A. Inciardi and Duane C. McBride, The Case Against Legalization in The Drug Legalization Debate, supra note 4, at 45, 51-55.

20. Its hard to keep the campesinos down on the coffee farm now that they have seen ten times the profits in the coca trade. Peter M. Sanchez, The "Drug War": The U.S. Military and National Security, 34 A.F. L. Rev. 109, 112-115 (1991).

21. The assault on the Columbian government by drug barons over extradition is but one example. Id. See also Charles Lane, The Newest War, Newsweek, Jan. 6, 1992, at 18.

22. See Reuter, supra note 9 at 15.

23. The Border Patrol and Customs Service reported exponential increases in drugs seized during the 1980's. See Role of Military in Drug Interdiction,

supra note 2, at 175-187; Drug Strategy 1991, supra note 13, at 93-100.

24. See Drug Strategy 1989, supra note 13, at 12, 73-79.

25. See Charles F. Williams, Interoperability Among Interdiction Forces in Counternarcotics (March 1991) (unpublished M.Sci. thesis, Naval Postgraduate School).

26. "The scourge of illegal drugs saps our vitality as a free people, diverts our energies from more positive pursuits and threatens friendly democratic governments now plagued by drug traffickers." The White House. United States National Security Strategy 17 (1991).

27. Dale E. Brown, Drugs on the Border: The Role of the Military, Parameters, Winter 1991-92, at 50, (quoting Department of Defense News Release No. 461-90, September 18 1990); see also National Drug Control Strategy: Hearing Before the House Select Committee on Narcotics Abuse and Control, 102nd Cong., 1st Sess. 3 (1991) (Statement of Hon. Stephen M. Duncan, Coordinator for Drug Enforcement Policy and Support,

Department of Defense) [hereinafter House Select Committee Hearing].

28. The Secretary of Defense's statement was more than mere words. He had five of the regional Commanders-in-Chief (CinCs) to organize for counter-drug operations. The CinCs of the Atlantic and Pacific commands established Joint Task Force-4 (at Key West, Florida) and Joint Task Force-5 (at Alameda, California) respectively. They conduct aerial and maritime coastal surveillance. The CinC responsible for the continental United States created Joint Task Force-6 (at El Paso, Texas) to perform interdiction along the Southwest border. The Southern Command CinC incorporated the drug mission (in Latin America) into its pre-existing structure. The North American Aerospace Defense Command (NORAD) similarly added radar surveillance of potential drug smugglers to its ongoing operations. Sanchez, supra note 20, at 138; Brown, supra note 27, at 52.

29. 10 U.S.C. § 124 (1988 & Supp. 1991).

30. Williams, supra note 25, at 49-52.

31. House Select Committee Hearing, supra note 27, at 12. See also John P. Coffey, Note, The Navy's Role in Interdicting Narcotics Traffic: War on Drugs or Ambush on the Constitution?, 75 Geo. L.J. 1947 (1987).
32. Brown, supra note 27, at 54-56.
33. Id., at 54.
34. Military Role in Drug Interdiction (Part 4): Hearing Before the Investigations Subcomm. of the House Armed Services Comm., 101st Cong., 1st Sess. 8-24 (1990)[hereinafter Military Role (Part 4)](Statement of Stephen M. Duncan).
35. Id., at 24-27; See generally Lane, supra note 21.
36. House Select Committee Hearing, supra note 27, at 8.
37. Military Role (Part 4), supra note 34, at 8-9.
38. Remember, however, when dealing with multinational endeavors, that "the way to international hell is paved with good conventions." Peter Rowe, Defence: The Legal

Implications 139 (1987) (quoting Roling, Hague Receuil de Cours (1960)).

39. Quoted in Military Role (Part 4), supra note 34, at 43.

40. Some observers believe this reference may be to the inherent power of the President to preserve public order and to carry out government operations in "emergencies" (a potentially restriction-encompassing exception). Leroy C. Bryant, The Posse Comitatus Act, the Military, and Drug Interdiction: Just How Far Can We Go?, The Army Lawyer, Dec. 1990, at 3, 5; see also H.W.C. Furman, Restrictions Upon Use of the Army Imposed by the Posse Comitatus Act, 7 Mil. L. R. 85, 87-92. Others find it to be an empty phrase. "The statute permits Constitutional exceptions. However, there are none." H.R. Rep. No. 71, Part II, 97th Cong., 1st Sess., at 6, reprinted in 1981 U.S. Code Cong. & Admin. News 1787 [hereinafter House Report].

41. The provisions of 10 U.S.C. §§ 331-36, for example, contain provisions allowing the President to employ federal troops in the quieting of civil unrest.

The Uniform Code of Military Justice, 10 U.S.C. §§ 801-940, provides another statutory basis for Presidential action.

42. 18 U.S.C. § 1385 (1988).

43. House Report, supra note 40, at 5 (testimony of Edward S.G. Dennis, Jr., Chief, Narcotic and Dangerous Drugs Section, Department of Justice).

44. See generally Sanchez, supra note 20, at 117-21.

45. Literally meaning, "power or force of the county". Black's Law Dictionary 1046 (5th ed. 1979).

46. John D. Gates, Note, Don't Call Out the Marines: An Assessment of the Posse Comitatus Act, 13 Tex. Tech. L. Rev. 1467, 1469 (1982). This authority is believed to derive from the Roman proconsuls' practice ("comitatus") of retaining an entourage to protect them on their travels throughout the empire. Roger Blake Hohnsbeen, Note, Fourth Amendment and Posse Comitatus Act Restrictions on Military Involvement in Civil Law Enforcement, 54 Geo. Wash. L. Rev. 404 (1986).

47. The practice continued through the "posse" of the American West, Gates, supra note 46, at 1469. The mistrust may have roots in Oliver Cromwell's division of England into districts governed by major-generals with military and police powers. Hohnsbeen, supra note 46.

48. See generally Barbara Tuchman, *The March of Folly* 128-231 (1984).

49. Meeks, Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act, 70 Mil. L. Rev. 83, 86 (1975).

50. "Despite this cautious attitude toward military power, the American Constitution is conspicuously silent on the issue of military enforcement of the law." Sanchez, supra note 20, at 118. See also James A. Inciardi, American Drug Policy and the Legalization Debate in Drug Legalization Debate, supra note 4, at 10; Furman, supra note 40, at 92-93. But see Coffey, supra note 31, at 1948-50 (finding implied constitutional "sentries" restricting military, after noting, "the Constitution makes no mention of the power



(or absence thereof) of the armies to enforce the law").

51. These loose references are most often found in congressional debates. See, e.g., House Report, supra note 40, at 19 (Dissenting views of Rep. Confers) ("The Constitutionally appropriate response is to deny all such requests [to use military to enforce custom laws] and to limit the military's role to that contemplated by the Constitution"). But academics are not immune. See Posse Comitatus Act: Hearing on H.R. 3519 Before the Subcomm. on Crime of the House Judiciary Comm., 97th Cong., 1st Sess. 43, 84 (1981) [hereinafter Posse Comitatus Hearing] (Statement of Prof. Christopher H. Pyle; Letter of Prof. Edward F. Sherman); see also Coffey, supra note 31.

52. Meeks, supra note 49, at 88.

53. Id. at 88-89.

54. Christopher A. Abel, Note, Not Fit for Sea Duty: The Posse Comitatus Act, the United States Navy, and

Federal Law Enforcement at Sea, 31 Wm. & Mary L. Rev  
445, 452 (1990).

55. "[T]he constitutionality of Washington's actions  
appears to have gone essentially unquestioned." Id.

56. Sanchez, supra note 20, at 120; Furman, supra note  
40, at 93.

57. Act of June 18, 1878, 20 Stat. 152 (1878)  
(codified at 18 U.S.C. § 1385 (1988)). See supra note  
42 and accompanying discussion for text of statute.

58. Furman, supra note 40, at 93-94. Also noted have  
been the resentment from use of military force to quell  
unrest in Kansas prior to the Civil War, Id., put down  
labor disputes, Deanne C. Siemer and Andrew S. Effron,  
Military Participation in United States Law Enforcement  
Overseas: The Extraterritorial Effect of the Posse  
Comitatus Act, 54 St. Johns L. Rev. 1, 27-28, enforce  
revenue laws and destroy untaxed stills, Memorandum  
from William P. Barr, Assistant Attorney General,  
Office of Legal Counsel, Department of Justice, to  
General Brent Scowcroft, Assistant to the President for

National Security Affairs, National Security Council 8-9 (Nov. 3, 1989) (discussing Act's inapplicability extraterritorially) [hereinafter DOJ Memo].

59. The precursor to the Posse Comitatus Act was introduced in the House of Representatives as a "rider" to the Army appropriations bill on the same day the election results were announced. See Meeks, supra note 49, at 90-91.

60. Id.; Siemer & Effron, supra note 58.

61. Although the rhetoric about civilian control over the military was recited. DoJ Memo, supra note 58, at 8.

62. The portraits drawn are indicative of how the passage of the Act was bound-up with the politics of the day. During a lengthy discourse on the roles of the militia and the standing Army, Congressman Kimmel, the original proponent of Posse Comitatus legislation struck the following contrast:

The militia-man is a part of his  
country; he is identified with it by all his

interests, feelings, and ambitions; his home, his wife, and children are among its treasures; he rests in its peace and thrives in its prosperity; he finds protection under its Constitution, assists at its government, and abides by its laws; he contributes to its support and offers his life in its defense; its history is the record of the achievements of his fathers; he shares its glory and its shame. If he survives the danger that called him to the field he returns to the body of the people, resumes the duties of civil life, and again contributes to the taxes he does not consume. Such is the militia-man this government, the agent of the people, refuses to organize, arm, and discipline for the execution of the laws and the suppression of insurrection.

7 Cong. Rec. 3584 (1878)

Instead, the Government had relied upon regulars, and

[a] regular is the reverse of all this. He is a soldier by trade; he lives by blood.

His is a business apart from the people. His

condition works a severance of interest. He consumes what they create. He seldom marries; nor does he accumulate property, nor form and continue social relations; his habits unfit him for the relations of civil life; he enlists and re-enlists, becomes a permanent part of the military establishment of the country, and looks to its bounty for pension or asylum as the refuge of his old age. The order of his superior is his only law. At the command of that superior he fights for or against the laws, the constitution, the country under which or in which he lives, in turn its master or its slave. He sacks, desecrates, indulges when and where he dares. He serves, obeys, destroys, kills, suffers, and dies for pay. He is a mercenary whom sloth, luxury, and cowardice hires to protect its ease, enjoyment, and life.

Id., quoted in James P. O'Shaughnessy, Note, The Posse Comitatus Act: Reconstruction Politics Reconsidered, 13 Am. Crim. L. R. 703, 732 (1976).

63. Of course some commentators would not appeal at all to the legislative background for guidance but look simply to the terms of the statute. Justice Antonin Scalia, The Sixteenth Decker Lecture in Administrative and Civil Law at the Judge Advocate General's School of the Army (Feb. 20, 1992) (criticizing any reliance upon legislative history as "unhelpful" in judicial decision making). The discussion need not end here. Justice Scalia did advise executive agencies to be mindful of the signals sent out by their overseeing legislative bodies when attempting to interpret statutory guidance. Id.

64. Curiously, the aims of the Posse Comitatus Act's supporters may have been better served by specifically amending the 1866 statute providing United States Magistrates with the authority to "summon . . . to their aid. . . such portion of the land and naval forces as may be necessary to the performance of [their] duty." Act of April 7, 1866, ch. 31, § 5, 14 Stat. 27; see Meeks, supra note 49, at 107-08. This provision is the basis for the apparently never-used power of U.S. Magistrates codified at 42 U.S.C § 1989 (1988).

Removing the objectionable authority would have clarified matters much more than establishing criminal penalties for its exercise.

65. O'Shaughnessy, supra note 62, at 731-32.

66. The vagueness of its intended targets make this so. (Who "willfully uses any part of the Army" when law enforcement is illegally aided? The President? The commanding general? The sheriff? The platoon sergeant?) Also unclear is the scienter requirement. Furman, supra note 40, at 97-106; O'Shaughnessy, supra note 62, at 731.

67. See Furman, supra note 40, at 97, 104-106, 118. More recently, in the celebrated Melissa Brannon missing child case, Army personnel from Fort Belvoir assisted in the initial searches of the Northern Virginia area. The use of military Judge Advocates to relieve civilian dockets under the Special Assistant United States Attorney program also seems problematic under the plain language of the Posse Comitatus Act. The issue was dodged by the Department of Justice. See Military Cooperation With Civilian Law Enforcement

Officials: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary, 98th Cong., 1st Sess. 89, 93-107 (1983) [hereinafter Military Cooperation 1983] (testimony of Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, Department of Justice).

68. Chandler v. United States, 171 F.2d 921, 936 (1st Cir. 1948), cert. denied, 336 U.S. 918 (1949). The court held the Act did not apply in occupied territory where no civilian law enforcement existed to supplant. It is one of the rationale for determining that the Act has no extraterritorial application. See infra notes 114-121 and accompanying text.

69. Gillars v. United States, 182 F.2d 962, 973 (D.C. Cir. 1950) (in Germany); D'Aquino v. United States, 192 F.2d 338, 351 (9th Cir. 1951) (in occupied Japan), cert. denied, 343 U.S. 935 (1952). A similar attempt to deprive courts of jurisdiction based on offense in Vietnam also failed. United States v. Cotten, 471 F.2d 744, 747-48 (9th Cir.), cert. denied, 411 U.S. 936 (1973). These cases, while all taking place outside of



U.S. territory, were decided on narrow interpretations of the Act's intent rather than broadly holding the statute inapplicable overseas.

70. United States v. Banks, 383 F. Supp. 368 (D.S.D. 1974); United States v. Jaramillo, 380 F. Supp. 1375 (D. Neb. 1974), appeal dismissed, 510 F.2d 808 (8th Cir. 1975); United States v. McArthur, 419 F. Supp. 186 (D.N.D.), aff'd sub nom. United States v. Casper, 541 F.2d 1275 (8th Cir. 1976), cert. denied, 430 U.S. 970 (1977); United States v. Red Feather, 392 F. Supp. 916 (D.S.D. 1975), reconsidered in part after transfer, United States v. McArthur, 419 F. Supp. 186, 189 n.1 (D.N.D.), aff'd sub nom. United States v. Casper, 541 F.2d 1275, 1278 (8th Cir. 1976), cert. denied, 430 U.S. 970 (1977).

71. Charged under 18 U.S.C. § 231(a)(3) (1970).

72. See Gates, supra note 46, at 1475-80;  
O'Shaughnessy, supra note 62, at 723-30.

73. 383 F. Supp. at 375.

74. 380 F. Supp. at 1381.

75. 419 F. Supp. at 195.

76. 392 F. Supp. at 925.

77. 383 F. Supp. at 375, 376.

78. The court found no criminal violation of the Act. It merely determined the government had not met the burden of showing its officials had acted lawfully once the defendant had sufficiently pointed out events which raised the issue. Id. at 376.

79. Id. at 375.

80. 380 F. Supp. at 1379.

81. Id.

82. Of course, the National Guard, depending on status, is not subject to the Posse Comitatus Act. The use of local militia in lieu of federal troops is precisely what the Act's proponents envisioned. See supra note 62, and accompanying text.

83. The military members present were indeed "any part

of the Army or Air Force" barred from enforcing laws.  
383 F. Supp. at 1380. But were they "enforcing?"

84. 392 F. Supp. at 921, 922.

85. See, e.g., Gates, supra note 46, at 1478  
(questioning the Red Feather opinion's lack of  
precedent for its conclusions).

86. Including use of materiel, presence of observer  
and advisor personnel, creation of plans for direct  
military action, National Guard aerial reconnaissance,  
negotiation and rule of engagement advising by Army  
personnel, and maintenance of provided equipment. 392  
F. Supp. at 921.

87. Id. at 925.

88. Of course the impact of this leap of faith was  
magnified by Congress' subsequent reference to the  
Wounded Knee cases' rationale. See infra, notes 132-  
139 and accompanying text.

89. The case arose when the Red Feather group of cases  
were transferred to the North Dakota district. The new

court reconsidered the previous findings. McArthur,  
419 F. Supp. at 189, 193.

90. Id. at 194-95.

91. Determined to be "too vague". Id. at 194.

92. Criticized as "too mechanical" to apply to close  
cases. Id.

93. Id.

94. Id. at 193-94.

95. O'Shaughnessy, supra note 62, at 728-29 (noting  
the difficulty the Banks and Jaramillo courts had  
clarifying the Posse Comitatus Act). See also,  
Hohnsbeen, supra note 46, at 406 (finding confusing and  
conflicting conclusions).

96. Sanchez, supra note 20, at 121 (blaming the  
multiple rationale for adding to the misinterpretation  
of the Posse Comitatus Act).

97. 392 F. Supp. at 925.

98. 380 F. Supp. at 1381.

99. Id. at 1379.

100. 392 F. Supp. at 923.

101. 419 F. Supp. at 194-95.

102. 383 F. Supp. at 375.

103. See, e.g., Meeks, supra note 49, at 122; Paul Jackson Rice, New Laws and Insights Encircle the Posse Comitatus Act, 104 Mil. L. Rev. 109, 113 (1984).

Professor Pyle reaches this same conclusion from the other end of the spectrum. The Act was intended to be an absolute bar. Any imposition of analytical distinctions like "active/passive" or "direct/indirect" are "as ephemeral as the distinction the old Supreme Court tried to draw between activities which directly and indirectly affected commerce prior to 1937." Posse Comitatus Act Hearing, supra note 51, at 42 (statement of Christopher Pyle).

104. House Report, supra note 40, at 5 (testimony of Edward S.G. Dennis, Jr. on behalf of the Department of Justice). See also Furman, supra note 40, at 86;

Meeks, supra note 49, at 123; Gates, supra note 46, at 1468; O'Shaughnessy, supra note 62, at 716-17.

105. See Furman, supra note 40, at 97, and text accompanying supra notes 66-67.

106. The result is stretching the Act for use in collateral attacks by an accused. See United States v. Banks, 383 F. Supp. 368 (D.S.D. 1974), United States v. Jaramillo, 380 F. Supp. 1375 (D. Neb. 1974) and the discussion accompanying supra note 70, 132. An exclusionary rule has also been read into the language by some courts. See, e.g., Taylor v. State, 645 P.2d 522 (Okla. 1982).

107. Furman, supra note 40, at 128-30. See also supra note 66.

108. Furman, supra note 40, at 95.

109. Id. at 96. See also The National Security Act of 1947, §§ 207-08, 61 Stat. 502.

110. Furman, supra note 40 at 98. See also United States v. Roberts, 779 F.2d 565, 567 (9th Cir. 1986);

Jackson v. State, 572 P.2d 87, 93 (Alaska 1977); Rice, supra note 103, at 127; Hohnsbeen, supra note 46, at 416, 420. But see United States v. Walden, 490 F.2d 372, 374 (4th Cir. 1974), cert. denied, 416 U.S. 983 (1974); Meeks, supra note 49, at 101. As a matter of policy, the Department of the Navy has followed the provisions of the Posse Comitatus Act and issued regulations which reflect its prohibitions. See Dep't of Defense Directive 5525.5, DOD Cooperation with Civilian Law Enforcement Officials (Jan. 15, 1986) [hereinafter DOD Dir. 5525.5]; SECNAV INSTR 5820.7B (28 Mar. 1988).

111. Abel, supra note 54, at 446.

112. See Coffey, supra note 31, at 1947-48. The statutory provision is codified at 10 U.S.C. § 379. It provides:

Assignment of Coast Guard personnel to naval vessels for law enforcement purposes.

(a) The Secretary of Defense and the Secretary of Transportation shall provide that there be assigned on board every appropriate surface naval vessel at sea in

a drug-interdiction area members of the Coast Guard who are trained in law enforcement and have powers of the Coast Guard under title 14, including the power to make arrests and to carry out searches and seizures.

(b) Members of the Coast Guard assigned to duty on board naval vessels under this section shall perform such law enforcement functions (including drug-interdiction functions)

(1) as may be agreed upon by the Secretary of Defense and the Secretary of Transportation; and

(2) as are otherwise within the jurisdiction of the Coast Guard.

(c) No fewer than 500 active duty personnel of the Coast Guard shall be assigned each fiscal year to duty under this section. However, if at any time the Secretary of Transportation, after consultation with the Secretary of Defense, determines that there are insufficient naval vessels available for purposes of this section, such personnel may be assigned other duty involving enforcement of laws listed in section 374(b)(4)(A) of this title.

(d) In this section, the term "drug-interdiction area" means an area outside the land area of the United



States (as defined in section 374(b)(4)(B) of this title) in which the Secretary of Defense (in consultation with the Attorney General) determines that activities involving smuggling of drugs into the United States are ongoing.

113. Without regard for whether it is based on counter-Cromwellian, anti-Reconstruction, or pro-military effectiveness principles. See supra notes 46-63 and accompanying text.

114. The intent to drawn from the Congressional debates is not clear. It appears that the problem of foreign application simply was not considered. The focus was on internal affairs. Several uses of the Army for law enforcement at the border (in Texas) and the western territories were plainly intended to be outside the statute's prohibitions. See Siemer and Effron, supra note 58, at 29-45.

115. DOJ Memo, supra note 58, at 8-10.

116. Id.

117. *Chandler v. United States*, 171 F.2d 921 (1st Cir. 1948), cert. denied, 336 U.S. 918 (1949).

118. 681 F. Supp. 891 (D.D.C. 1988).

119. Id. at 893. The Yunis decision is not as clear as it might be, however. It focuses on the indirect nature of the Navy's assistance rather than clearly resting on the statute's limited reach beyond the borders. See Abel, supra note 54, at 465; DOJ Memo, supra note 58, at 18.

120. Furman, supra note 40, at 107-08 ("[The Posse Comitatus Act] does not apply in foreign countries . . ."); Siemer and Effron, supra note 58, at 54 ("neither the legislative history . . . nor . . . statutory construction require that the Act be given extraterritorial effect."); Bryant, supra note 40, at 11 (" . . . courts likely will not hold that the PCA applies outside the United States."); Sanchez, supra note 20, at 133 ("Legal opinion also appears to support the conclusion that the Posse Comitatus Act should not apply extraterritorially."). The issue may surface in any appeals challenging Operation Just Cause in the

case against Manuel Noriega. Id. at 134-36; see generally Jessica W. Julian, Noriega: The Capture of a State Leader and its Implications on Domestic Law, 34 A.F. L. Rev. 153, 160-76 (1991).

121. The Yunis court was reluctant to find the Posse Comitatus Act applicable when "[b]y its very nature, the operation required the aid of military located in the area." 681 F. Supp. at 893.

122. Sanchez, supra note 20, at 140-41. The House of Representatives was diplomatic enough to blame the military's reticence on the vagueness of the law. "The Posse Comitatus Act . . . is sufficiently ambiguous to cause some commanders to deny aid, even when such assistance would in fact be legally proper. This reluctance to act should be cured by this legislative clarification of Congressional intent . . . . House Report, supra note 40, at 3. See also Military Cooperation 1983, supra note 67, at 121 (statement of Ronald L. Lauve, Senior Associate Director, Government Accounting Office) (reporting both military and

civilian officials cited Act's ambiguity as primary factor limiting assistance).

123. Sanchez, supra note 20, at 122, n.133.

124. Department of Defense Authorization Act, 1982, Pub.L. No. 97-86, § 905(a)(1), 95 Stat. 1114 (1981) (codified as subsequently amended at 10 U.S.C. §§ 371-380 (1988)). See, e.g., Abel, supra note 54, at 465; Sanchez, supra note 20, at 122-23.

125. House Report, supra note 40, at 3, 7.

126. 10 U.S.C. § 371 reads:

Use of information collected during military operations

(a) The Secretary of Defense may, in accordance with other applicable law, provide to Federal, State, or local civilian law enforcement officials any information collected during the normal course of military training or operations that may be relevant to a violation of any Federal or State law within the jurisdiction of such officials.

(b) The needs of civilian law enforcement officials for information shall, to the maximum extent

practicable, be taken into account in the planning and execution of military training or operations.

(c) The Secretary of Defense shall ensure, to the extent consistent with national security, that intelligence information held by the Department of Defense and relevant to drug interdiction or other civilian law enforcement matters is provided promptly to appropriate civilian law enforcement officials.  
10 U.S.C. § 371 (1988 & Supp. 1991) (including 1988 amendments).

127. 10 U.S.C. § 372 provides:

Use of military equipment and facilities

The Secretary of Defense may, in accordance with other applicable law, make available any equipment (including associated supplies or spare parts), base facility, or research facility of the Department of Defense to any Federal, State, or local civilian law enforcement official for law enforcement purposes.  
10 U.S.C. § 372 (1988 & Supp. 1991) (including 1988 amendment).

128. 10 U.S.C. § 373 reads:

Training and advising civilian law enforcement  
officials

The Secretary of Defense may, in accordance with  
other applicable law, make Department of Defense  
personnel available--

(1) to train Federal, State, and local civilian  
law enforcement officials in the operation and  
maintenance of equipment, including equipment made  
available under section 372 of this title; and

(2) to provide such law enforcement officials with  
expert advice relevant to the purposes of this chapter.  
10 U.S.C. § 373 (1988 & Supp. 1991) (including 1985 and  
1988 amendments).

129. 10 U.S.C. § 374 reads, in part:

Maintenance and operation of equipment

(a) The Secretary of Defense may, in accordance  
with other applicable law, make Department of Defense  
personnel available for the maintenance of equipment  
for Federal, State, and local civilian law enforcement  
officials, including equipment made available under  
section 372 of this title.

(b)(1) Subject to paragraph (2) and in accordance with other applicable law, the Secretary of Defense may, upon request from the head of a Federal law enforcement agency, make Department of Defense personnel available to operate equipment (including equipment made available under section 372 of this title) with respect to--

(A) a criminal violation of a provision of law specified in paragraph (4)(A); or

(B) assistance that such agency is authorized to furnish to a State, local, or foreign government which is involved in the enforcement of similar laws.

(2) Department of Defense personnel made available to a civilian law enforcement agency under this subsection may operate equipment for the following purposes:

(A) Detection, monitoring, and communication of the movement of air and sea traffic.

(B) Aerial reconnaissance.

(C) Interception of vessels or aircraft detected outside the land area of the United States for the purposes of communicating with such vessels and

aircraft to direct such vessels and aircraft to go to a location designated by appropriate civilian officials.

(D) Operation of equipment to facilitate communications in connection with law enforcement programs specified in paragraph (4)(A).

(E) Subject to joint approval by the Secretary of Defense and the Attorney General (and the Secretary of State in the case of a law enforcement operation outside of the land area of the United States)--

(i) the transportation of civilian law enforcement personnel; and

(ii) the operation of a base of operations for civilian law enforcement personnel.

(3) Department of Defense personnel made available to operate equipment for the purpose stated in paragraph (2)(C) may continue to operate such equipment into the land area of the United States in cases involving the pursuit of vessels or aircraft where the detection began outside such land area.

(c) The Secretary of Defense may, in accordance with other applicable law, make Department of Defense personnel available to any Federal, State, or local



civilian law enforcement agency to operate equipment for purposes other than described in subsection (b)(2) only to the extent that such support does not involve direct participation by such personnel in a civilian law enforcement operation unless such direct participation is otherwise authorized by law.

10 U.S.C. § 374(a)-(b)(3), (c) (as amended in 1984, 1986, and 1988; definition section omitted).

130. House Report, supra note 40, at 12.

131. Id. at 5. United States v. Banks, 383 F. Supp. 368 (D.S.D. 1974); United States v. Jaramillo, 380 F. Supp. 1375 (D. Neb. 1974), appeal dismissed, 510 F.2d 808 (8th Cir. 1975); United States v. Red Feather, 392 F. Supp. 916 (D.S.D. 1975), reconsidered in part after transfer, United States v. McArthur, 419 F. Supp. 186, 189 n.1 (D.N.D.), aff'd sub nom. United States v. Casper, 541 F.2d 1275, 1278 (8th Cir. 1976), cert. denied, 430 U.S. 970 (1977).

132. The Banks, Jaramillo, and Red Feather cases generated conflicting rulings. See supra text accompanying notes 70-102.

133. In § 372.

134. 383 F. Supp. at 376.

135. Id.

136. 380 F. Supp. at 1380.

137. In § 373.

138. 380 F. Supp. at 1380 ("personnel who flew the one or more reconnaissance missions were" improperly used to "execute the laws.").

139. 392 F. Supp. at 925.

140. This assertion is founded upon the close relationship between the subject matter and organization of the 1981 amendments and the list of permissible activities in Red Feather. Compare 10 U.S.C. §§ 371-374 with 392 F. Supp. at 925. See also House Report, supra note 40, at 6; Rice, supra note 103, at 138.

141. Under § 371.

142. As long as the soldier is also being investigated, reporting spouse's activities to the civilian authorities is not prohibited. Rice, supra note 103, at 113-14 (opining that § 371 "is a classic case of stating the obvious").

143. Two matters complicate this assertion. Both illustrate the difficult statutory and regulatory amalgam resulting from incremental actions in the area. First, the 1988 amendments to § 371 included language encouraging commanders to bend their "normal operations" to law enforcement needs. 10 U.S.C. § 371 (b). Second, independent statutory action to broaden investigatory powers, created a loophole where military police may assist in civilian undercover drug operations under blanket authority from the Department of Defense Inspector General. See Pub. L. 95-452, Inspector General Act of 1978, as amended by Pub. L. 97-252; Inspector General of the Department of Defense Criminal Investigations Policy Memorandum Number 5, Oct. 1, 1987, subject: Criminal Drug Investigation Activities (on file with author).

144. Under § 372 (facilities use) and § 373 (training).

145. Rice, supra note 103, at 121. If the authorities merely expect a disturbance and receive military training the week before, the clear line gets hazier.

146. 10 U.S.C. § 375 (Supp. 1991).

147. 10 U.S.C. § 375 reads:  
Restriction on direct participation by military personnel

The Secretary of Defense shall prescribe such regulations as may be necessary to ensure that any activity (including the provision of any equipment or facility or the assignment or detail of any personnel) under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law.

10 U.S.C. § 375 (as amended in 1988 and 1989). See also 10 U.S.C. § 374(c) (set forth, supra note 129)

which places similar restraint upon personnel operating equipment.

148. United States v. Red Feather, 392 F. Supp. 916, 925 (D.S.D. 1975). The court's reasoning in this specific area has been severely criticized. "[W]ith no apparent precedent, the court listed those activities which violate the Act . . . . [T]he judicial and statutory foundation upon which its decision rests seems hastily hammered together with little precedential girding." Gates, supra note 46, at 1478.

149. The Red Feather opinion uses both direct/indirect and active/passive terminology. 392 F. Supp. at 921-25. The statute and legislative report use the direct/indirect wording. See, e.g., House Report, supra note 40, at 6, 10.

150. See also supra notes 84-102 and accompanying text.

151. It is difficult to know just how much to draw from Congress' embracing of Red Feather (and the other Wounded Knee opinions) in § 375.

152. Under § 371 and § 373.

153. Compare § 373(2) with § 375.

154. Compare § 372 with § 375.

155. Compare § 374(b)(1) with § 374(2)(E) and § 374(c). Later amendments clarify the transportation question. See infra discussion accompanying note 169.

156. Peter Rowe, *Defence: The Legal Implications* 38 (1987) (quoting *The Queen v. McNaughton*, 1975 N.Ir. 203 (Lord Lowry, C.J.)).

157. See, for example, the exchange between Representative Charles E. Bennett ("Congress has not hesitated to allow direct participation by the military in matters of even lesser magnitude and importance.") and Representative William J. Hughes ("[My] concern . . . is that we do maintain the separation . . . between the military and the civilian in the area of law enforcement.") during hearings on the 1981 statute. Posse Comitatus Hearing, supra note 51, at 3, 6. See also Military Cooperation 1983, supra note 67, at 92 (statement of Rep. Hughes) ("[I]n the compromise that

was struck between the House and the Senate that had us hung up for 3 months, the most important issue was trying to maintain the separation between military involvement and civilian law enforcement.").

158. One commentator has accurately coined the phrase "American dilemma" to describe the conflict between fighting the contemporary drug problem and preserving traditional military-civilian separation. Bryant, supra note 40, at 3, n.9.

159. See, e.g., Initiatives in Drug Interdiction (Part 1): Hearings Before the Subcomm. on Government Information, Justice, and Agriculture of the House Comm. on Government Operations, 99th Cong., 1st Sess. 199, 205 (1985) [hereinafter Initiatives] (testimony of Dr. Lawrence Korb, Asst. Secretary of Defense for Manpower, Installations and Logistics); Military Cooperation With Civilian Law Enforcement: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary, 99th Cong., 1st Sess. 105 (1985)[hereinafter Military Cooperation 1985] (discussing the weakening of Rep. Bennett's original proposal, first in committee,

then in a compromise with the Senate over Posse Comitatus concerns).

160. The sections of Title 10 set out previously contain the amended language. See supra notes 126-129 and 147.

161. Like the 1878 Posse Comitatus Act, most of the attempts at clarification or modification have been passed as part of the large Department of Defense annual appropriation (or authorization) bill. This continuing practice has been criticized as providing neither the proper forum for important changes to organic law nor the time for careful attention from lawmakers. Posse Comitatus Hearing, supra note 51, at 38 (Statement of Prof. Christopher H. Pyle); Role of the Military in Drug Interdiction, supra note 2, at 36 (testimony of Hon. Grant Green, Assistant Secretary of Defense, Force Management and Personnel).

162. See, e.g., Military Cooperation 1985, supra note 159 at 8-10 (Statement of Hon. Edward I. Koch, Mayor of New York City).



163. Department of Defense witnesses on Capitol Hill were grilled about this impression of reluctance at almost every hearing. See, e.g., Initiatives, supra note 159, at 199; Role of Military in Drug Interdiction, supra note 2, at 33-35; Military Role in Drug Interdiction (Part 3): Hearing Before the Investigations Subcomm. of the House Armed Services Comm., 101st Cong., 1st Sess. 40 (1989) ("[W]e on the Armed Services Committee have been after DOD to take a more active role for years.").

164. National Defense Authorization Act for Fiscal Year 1989, Pub. L. No. 100-456, § 1104(a), 102 Stat. 2043 (1988) (amending 10 U.S.C. § 371).

165. National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. 101-189, § 1206, 103 Stat. 1564 (1989). See also National Defense Authorization Act for Fiscal Year 1991, Pub. L. 101-510, § 1004(e), 104 Stat. 1630 (1990) (allowing the Secretary of Defense to plan and execute training or operations for the purpose of aiding civilian law enforcement). The contradiction in referring to "normal course of

training or operations" in one subsection then requiring those operations to be tailored to civilian anti-drug requirements does not seem to bother the drafters. See also supra note 143.

166. § 1104(a), 102 Stat. 2043 (amending §§ 372 and 373). The Fiscal Year 1990 authorization made the provision mandatory.

167. See House Report, supra note 40, at 12.

168. See 10 U.S.C. § 374. The text of the statute set forth supra note 129.

169. See § 1004, 104 Stat. 1629-30. This aid is specifically funded. It functions like a foreign military assistance program applied in the domestic civilian law enforcement area.

170. 10 U.S.C. § 376 (1988 & Supp. 1991) (prohibiting support which adversely affects military preparedness).

171. § 1004(d), 104 Stat. 1630.

172. § 1006, 104 Stat. 1631.

173. 10 U.S.C. § 124 (1988 & Supp. 1991).

174. Reuter, supra note 9, at 14.

175. DOD Dir. 5525.5.

176. DOD Dir. 5525.5, para. A.1. (Encl 4).

177. The military purpose doctrine reasons that the Posse Comitatus Act is not violated by operations primarily furthering a military purpose, despite incidentally benefitting civilians. See Army Reg. 27-21, Administrative and Civil Law Handbook, para. 3-4 (18 Sept. 1990).

178. See, e.g., DOD Dir. 5525.5, para. A.4. (Encl 2), para. A.2. (Encl 4).

179. See United States v. Thompson, 30 M.J. 570 (A.F.C.M.R. 1990) (holding Act does not limit military activities whose primary purpose is furtherance of military or foreign affairs function regardless of benefits which incidentally accrue to civilian law enforcement).

180. DOD Dir. 5525.5, para. A.4. (Encl 2).

181. See text accompanying supra notes 165-169.

182. Army Reg. 500-51, Support to Civilian Law Enforcement (1 July 1983); Air Force Reg. 55-35, Air Force Assistance to Civilian Law Enforcement Officials (22 Dec. 1986); SECNAV INSTR. 5820.7B (28 Mar. 1988).

183. The directive's exposition of actions with a recognized military purpose under the section heading "Permissible direct assistance" begins the confusion. DOD Dir. 5525.5, para. A.2. (Encl 4). Actions with a military purpose are allowed because they are not direct assistance. They only incidentally benefit civilian authorities.

184. DOD Dir. 5525.5, para. A.4. (Encl 4). Presumably, defining "large scale" and "elaborate" training was left to local regulations. Is one agent attending Command and Staff College elaborate? Is allowing all police officers from Oceanside, California to receive night operations training large scale?

185. DOD Dir. 5525.5, para. A.5. (Encl 4).

186. Compare DOD Dir. 5525.5, para. A.4. (Encl 2) with § 1104(a), 102 Stat. 2043 and § 1004(b), 104 Stat 1629 (amending 10 U.S.C § 374).

187. See, e.g., DOD Dir. 5525.5, para. B. (Encl 2), para. C. (Encl 3), para. D. (Encl 4). The amendment is discussed at supra notes 170-171 and accompanying text.

188. DOD Dir. 5525.5, para. A.3. (Encl 4).

189. 10 U.S.C. § 375.

190. DOD Dir. 5525.5, para. A.4. (Encl 4).

191. See, e.g., Military Cooperation 1983, supra note 67, at 92 (statement of Rep. Hughes) (suggesting that primary concern in debate over 1981 Act was avoiding putting military personnel in confrontational situations).

192. DOD Dir. 5525.5, para. A.7. (Encl 4).

193. The language is drawn from the McArthur decision. It criticized the direct/indirect distinction as "too mechanical," proposing instead the vague language used in the directive. McArthur, 419 F. Supp. at 189, 193.

194. The current message at the time of this writing was issued in December. Message, Chairman of the Joint Chiefs of Staff, 190050Z Dec 91, subject: Delegation of Authority for Approving Operational Support to Drug Law Enforcement Agencies and Counterdrug-related Deployment of DOD Personnel [hereinafter CJCS Message].

195. Id. at 2.

196. As one operator involved with the El Paso Joint Task Force noted, "We spend a good part of our time here just making sure that planned operations stay within the bounds of the law." Darrell Cochran, Supporting the Drug War, Soldiers, September 1991, at 50.

197. CJCS Message, at 1-3.

198. Memorandum from Robert L. Gilliat, Assistant General Counsel (Personnel & Health Policy), Office of General Counsel, to Deputy Assistant Secretary of Defense (Drug Enforcement Plans and Support), Department of Defense (Sept. 24, 1990) (on file with author) [hereinafter OGC Memo].

199. See Brown, supra note 27, at 53.

200. Role of the Military in Drug Interdiction, supra note 2, at 184 (testimony of Michael Williams, Chief Patrol Agent, U.S. Border Patrol).

201. See, e.g., Current Law Enforcement Problems on U.S. Land Borders: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary, 99th Cong., 2d Sess. (1986) (statement of Commissioner Alan Nelson, Immigration and Naturalization Service).

202. See generally Howard A. Latin, Gary W. Tannehill, and Robert E. White, Remote Sensing Evidence and Environmental Law, 64 Calif. L. Rev. 1300 (1976) (discussing the development of infrared and similar techniques and the nature of the electromagnetic spectrum).

203. Or in the case of aerial surveys, the existence of a structure or other warm spot where one should not be (as in a remote national forest).

204. They also may be coupled with those low-technology devices, the binoculars or telescope.

205. They employ photographic and infrared sensors with the ability to discern detail in the inches range. Unofficial reports suggest they have been used in the war on drugs. See David C. Morrison, Spy Satellites: The Amazing Flights of America's Spy Birds, Lasers & Optronics, July 1991, at 19. The article comments on security concerns' limiting information about the technology by noting that the office which operates defense satellites is allegedly so covert even its letterhead is classified top secret. Id.

206. House Select Committee Hearing, supra note 27, at 15. The Army team pinpointed the tunnel in a matter of hours. Local authorities searched the house on the Mexican side of the border. Over 2 tons of cocaine and 14 tons of marijuana were discovered. Brown, supra note 27, at 56.

207. The Defense Advanced Research Projects Agency has several exotic concepts under development. One is a Laser Radar (or LIDAR). Like a laser range-finder it sends out a beam and detects the reflection. LIDAR can analyze the return scatter to identify chemical



products in the air. Another is a miniaturized, wearable gas or chemical detector which would work like a microphone or "bug" for drug manufacturing agents. A drug detection litmus paper is also contemplated.

High-Technology Weapons in the War on Drugs: Hearing Before the Senate Comm. on the Judiciary, 101st Cong., 2d Sess. 100, 102, 126 [hereinafter High-Tech] (testimony of Dr. John D. Immele, Program Director, Conventional Defense Technology, Los Alamos National Laboratory).

208. House Select Committee Hearing, supra note 27, at 35 ("The best drug detection technology continues to be the cold wet nose of a drug-sniffing dog.").

209. The Fourth Amendment protects against unreasonable searches and seizures and requires search warrants based upon probable cause. U.S. Const. amend. IV.

210. See, e.g., *Silverman v. United States*, 365 U.S. 505, 509 (1961) (expressing concern with technological development of "frightening paraphernalia" for surveillance).

211. See, e.g., Surveillance Technology: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. 1 (1975) (statement of Sen. John Tunney) ("Technological developments [in surveillance] are arriving so rapidly and are changing the nature of our society so fundamentally that we are in danger of losing . . . control over our privacy, our freedom and our dignity."); High-Tech, supra note 207, at 6 ("[T]he Judiciary Committee has to be very sensitive as we step into the 21st century that we do not step on the constitutional guarantees that we have as well.") (statement of Sen. William S. Cohen).

212. Congress has only acted in the area of electronic communications. See, e.g., 18 U.S.C. § 2510 (1988) (Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended). The Supreme Courts has not succeeded in providing guidance in the remainder of the techniques. "[C]lose decisions and shifting majorities have resulted in a crazy melange of rules and principles." Robert C. Power, Technology and

the Fourth Amendment: A Proposed Formulation for Visual Searches, 80 J. Crim. L. & Criminology 1, 4 (1989).

213. In 10 U.S.C. § 375.

214. The statute uses "search" in the restrictive language of § 375 and "reconnaissance" in the authorized actions of § 374. Logic dictates that Congress meant to at least allow remote sensing "reconnaissance" activities up to the point they constitute direct participation in a Fourth Amendment or broader "search."

215. Meaning the exclusion of evidence obtained in violation of the Fourth Amendment, *Weeks v. United States*, 232 U.S. 383 (1914), not the Posse Comitatus Act, *Taylor v. State*, 645 P.2d 522 (Okla. 1982).

216. See generally 1 Wayne R. LaFave, *Search and Seizure* §§ 1.2 (2d ed. 1987).

217. To make the point rhetorically: If a request can be granted without violating the Act, why should DOD care if the information obtained may be admissible in any later prosecution? Not because of potential tort

liability. See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

218. House Report, supra note 40, at 11-12.

219. Posse Comitatus Hearing, supra note 51, at 12-13, 15-22, 24-32 (discussing "seizure and arrest" authority -- meaning of boats and people -- but not searches). The section culminates in a crucial dialogue between Representative Hughes, the DOD General Counsel and the Justice Department spokesman which determines that the language allowing "members of the Armed Forces to operate" provided equipment (incorporated into § 374(b)) "takes care" of the direct involvement in seizures and arrests problem. Id. at 29. Representative Hughes notes the lack of time in which to properly draft the critical language at issue. Id. at 33.

220. Id., at 12 (testimony of Edward S.G. Dennis, Jr., Chief, Narcotic and Dangerous Drugs Section, Department of Justice).

221. House Report, supra note 40, at 12 n.3. The

report goes on to note that it did not intend to encourage use of such assistance within the boundaries of the United States. Id. While not a ringing endorsement, it is a long way from prohibition of surveillance "searching".

222. Id.

223. See, e.g. OGC Memo, supra note 198.

224. House Report, supra note 40, at 10, cited in OGC Memo, supra note 198, at 34.

225. The better view is that

226. This concept runs through the congressional discussions, at the 1981 Act's consideration, and in later hearings. See, e.g., Posse Comitatus Act Hearing, supra note 51, at 30 (statement of William Howard Taft, IV, General Counsel, Department of Defense) (noting it is the arrests and the seizures which put the military and a violator of a civilian statute into an immediate confrontation); Id. at 47 (statement of Prof. Christopher H. Pyle) (observing that a concern with use of military operated equipment

as platform for police operations is involvement in a direct confrontation with civilians); Letter from William Howard Taft, IV, General Counsel, Department of Defense, to Rep. William H. Hughes (June 3, 1981) in Posse Comitatus Act Hearing, supra note 51, at 187 (opposing military operation of equipment for counter-drug operations because they involve intense confrontations); Federal Drug Interdiction: The Role of the Department of Defense: Hearing Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs, 101st Cong, 1st Sess. 104 (1989) (expressing concern that arrest authority would lead to confrontations between uniformed military and American civilians).

227. See W. Hays Parks, Righting the Rules of Engagement, Proceedings, May 1989, at 83-93.

228. A wise operator can also envision limited use of each without risk of confrontation. Drug dog requests are the most problematic as the military handler must closely accompany the sensor. See Role of Military in Drug Interdiction, supra note 2, at 40-55.

229. See supra notes 114-121 and accompanying text.

230. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (holding Fourth Amendment does not apply to U.S. agents searching non-citizens beyond the territory of the United States). The majority may have only clearly declined to extend the Fourth Amendment's warrant requirement extraterritorially. David Haug, *Recent Development*, 32 Harv. Int'l L.J. 295, 298 (noting the opinions of Justice Kennedy and Justice Stevens directly concur only regarding the warrant provision); see also LaFave, supra note 216, at § 1.8 (Supp. 1991).

231. Haug, supra note 230, at 296; see also Julian, supra note 120, at 177, 181-183, 185-86.

232. 494 U.S. at 273-74. The court intends to free those conducting military operations from the "sea of uncertainty as to what might be reasonable in the way of search and seizures conducted abroad." Id. at 274.

233. Because the Verdugo-Urquidez case involved civilian Drug Enforcement Agency, not military,

personnel, no stronger conclusion can be drawn from the actual ruling.

234. OGC Memo, supra note 198.

235. United States v. Katz, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

236. Power, supra note 212, at 4, 18.

237. 389 U.S. 347 (1967).

238. Id. at 361 (Harlan, J., concurring). The test was subsequently embraced by the entire Court. See Smith v. Maryland, 442 U.S. 735 (1979).

239. LaFave, supra note 216, at § 2.1 (b).

240. Courts tend to ask: Did A manifest a subjective privacy interest by putting up a fence? Well, is A's fencing of the backyard the sort of expectation of privacy society will allow? See, e.g., California v. Ciruolo, 476 U.S. 207 (1986). This may be inevitable given the ability of the government to shape the subjective interest. If the police announce that they will peer over fences like A's during their rounds, A



could not then think the fence was creating a private area. Society, however, may be willing to grant a privacy right to prevent police peering. See Smith v. Maryland, 442 U.S. 735, 741 n.5 (1979).

241. While not a perfect analogy, these "wastes" might be viewed as having lost any privacy interest like the curbside garbage in United States v. Greenwood. 486 U.S. 35 (stating residents implicitly consent to an examination of items placed in a trash bag for garbage pick-up). Because the electromagnetic or chemical emissions at the heart of remote sensing are less controllable than garbage, the analogy should not be taken too far.

242. California v. Ciraolo, 476 U.S. 207 (1986) (visual aerial surveillance); Dow Chemical Co. v. United States, 476 U.S. 227 (1986) (aerial photography); Oliver v. United States, 466 U.S. 170 (1984) (entry into open fields); United States v. Knotts, 460 U.S. 276 (1983) (monitoring beeper); Smith v. Maryland, 442 U.S. 735 (1979) (capturing phone numbers with pen register); United States v. Place, 462

U.S. 696 (1983) (dog sniffing); United States v. Dunn,  
480 U.S. 294 (1987) (using flashlight in barn).

243. Smith v. Maryland, 442 U.S. at 739.

244. Power, supra note 212, at 18.

245. See David E. Steinburg, Making Sense of  
Sense-Enhanced Searches, 74 Minn. L. Rev. 563 (1990).

246. What is reasonably considered private depends in  
large part on whether you are concerned with  
intrusiveness, sanctity of the home, plain view,  
location of observer, enhancing eyesight,  
sophistication of technique, or balancing all factors.  
Power, supra note 212, at 54-68.

247. This is, of course, one reason it is impractical  
for each civilian law enforcement request for  
sophisticated hardware to be subjected to Fourth  
Amendment scrutiny. If the federal judiciary cannot  
agree on what constitutes a search, it does not seem  
likely that Congress would want the military members to  
face criminal penalties for making the wrong  
determination.

248. 773 F. Supp. 220 (1991).

249. Id. at 223-24.

250. Id. at 225.

251. Id. at 226.

252. 483 U.S. 35, 40 (1987).

253. 773 F. Supp. at 226. This seems clearer for the heat "byproduct" of criminal conduct than for garbage bagged for collection. Assume Penny-Fenney had been engaged in more gruesome conduct which produced screams of pain or pooling blood detectible outside her home. Observation of these suspicious occurrences as bases for a search warrant would not be questioned.

254. What the Penny-Fenney opinion properly implies is that the use of a remote sensing technology may differ from unaided observations. It does not, however, materially alter the "quality of seclusion" or "sense of security" which underlie the abstract determination of societal standards . See LaFave, supra note 216, § 2.1(d). Thus, this use of FLIR-like sensors is not

violative of any objective expectation of privacy recognized by society as reasonable. This is most helpful point of the court's extolling FLIR's capability to be non-intrusive, inoffensive and without embarrassment.

255. United States v. Knotts, 460 U.S. 276 (1983).

256. See, e.g., United States v. Place, 462 U.S. 696 (1983); United States v. Solis, 536 F.2d 880 (9th Cir. 1976).

257. 773 F. Supp. 220 at 227; cf. Florida v. Riley, 488 U.S. 445, 451 (1989) (approving visual observation of home from helicopter). Critics have been unhappy with the reliance on inability to observe "intimate details". Id. at 463 (Brennan, J., dissenting); OGC Memo, supra note 198, at 32. While the wording may be unfortunate, the concept is sound. Society allows observation which provides broad information like exterior temperatures more readily than specific confidences. That sets the bounds of the objective privacy expectation.

258. The dog alerts on specific drugs or explosives. The beeper tracks presence or location. FLIR indicates relative heat.

259. This is the succinctly reasoned holding of Penny-Fenney. 773 F. Supp. at 228. It is, of course, dependent on the use of the equipment from a proper location. Aerial FLIR within proper airspace does not violate any reasonable privacy interest. Id. at 227.

260. United States v. Place, 462 U.S. 696 (1983). See also United States v. Coyler, 878 F.2d 469 (D.C. Cir. 1989); United States v. Solis, 536 F.2d 880 (9th Cir. 1976).

261. See LaFave, supra note 216, § 2.2(f) (limiting Place decision's application outside of public places).

262. See United States v. Thomas, 757 F.2d 1359, (2d Cir.) (holding that use of dog outside of apartment door constituted a search), cert. denied, 474 U.S. 819 (1985).

263. United States v. Coyler, 878 F.2d 469 (D.C. Cir.

1989) (upholding use of dog in hallway of train to sniff sleeping compartment).

264. Each technique magnifies normal visual acuity. From a pure posse comitatus standpoint, these items are less troublesome. With the exception of satellites, they are not so sophisticated that they must be loaned with military operators. (The limited information about satellite support implies they observe only areas outside the United States. See Morrison, supra note 205.) Thus, the concern with improper direct participation in a search is reduced. Their Fourth Amendment problems are still germane because misuse of military equipment could hamper drug prosecutions. The Department of Defense's advising responsibilities under 10 U.S.C § 373 should include knowledge of proper effective use of the devices.

265. Peering in a window with binoculars tells the viewer much more than the temperature of the roof.

266. Dow Chemical Co. v. United States, 476 U.S. 227 (1986)

267. Navigable airspace, Id., and open fields, *Oliver v. United States*, 466 U.S. 170 (1984), are appropriate sites for viewing.

268. *United States v. Dunn*, 480 U.S. 294 (1987) (approving crossing of fenced ranch land and flashlight illumination of interior of barn).

269. Katz, 389 U.S. 347.

270. See LaFave, supra note 216, § 2.3.

271. It does remove the tendency of the "expectations" paradigm to weigh the sophistication of the technology used. Consider a night vision scope. A lip reading observer can use it to make out verbal communications on a dark night. An ordinary observer can use it to make out a figure placing items in a bag. A third observer can confirm that the formerly open shed door is now closed. The sense of privacy violation decreases with each use, independent of the means of observation.

272. The historic lack of prosecutions under the Posse Comitatus Act is no salve to one who unwittingly breaks

the law. The possibility of less drastic remedies like personal tort liability, *Bissonette v. Haig*, 800 F.2d 812 (8th. Cir. 1986) (en banc) (finding that violation of Act does give rise to a tort cause of action), aff'd for lack of a quorum, 485 U.S. 264 (1988), or exclusion of evidence for posse comitatus violations, *Taylor v. State*, 645 P.2d 522 (Okla. 1982), are little comfort. See also Posse Comitatus Hearing, supra note 51, at 13, 187 (suggesting legislative changes to prohibit application of exclusionary rule and recognizing civil liability concern).

273. 18 U.S.C. § 1385.

274. Military Cooperation (1985), supra note 159, at 3 (statement of Rep. Bennett) ("So as to all that sanctity about that Posse Comitatus law, my impression is that it would be good for the country if that law was repealed in its entirety.").

275. Critics treat the organization as monolithic, ignoring the specialized capacities. Certainly the average military mess hall technician cannot become a drug enforcement agent overnight. But Special Forces



troops and a civil affairs team might be more valuable in a drug raid than the police records clerk.

276. Joint Task Force-6, for example, received over 550 requests for military support from law enforcement agencies in Fiscal Year 1991. Brown, supra note 27, at 56.

277. Initiatives, supra note 159, at 245 (statement of Rep. English).